EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1220

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and
WM. ELLIOTT,

Appellees.

TRANSCRIPT OF RECORD.

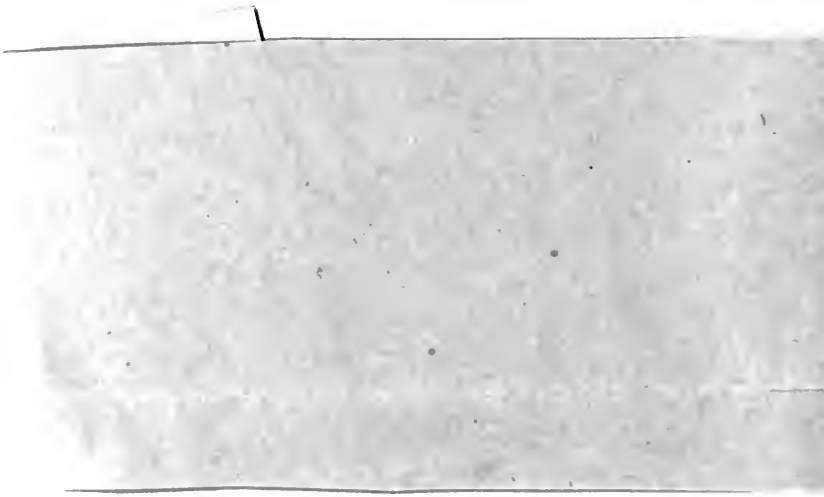
Upon Appeal from the United States District Court for the District of Alaska, Second Division.

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

Records of Criminal Court

of Appeals

334



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In the United States Circuit Court of Appeals for the Ninth Circuit.

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

Stipulation Enlarging Time to File Transcript.

It is hereby stipulated by and between the above-named parties, appellant and respondents, that the time for the petitioners in error to file the transcript of the record, and to docket the above-entitled cause on appeal with the clerk of the Circuit Court of Appeals for the Ninth Circuit, may be enlarged to and including the 16th day of August, 1905.

Dated at Nome, Alaska, this 11th day of July, A. D. 1905.

A. J. BRUNER,
Attorney for Appellant.
IRA D. ORTON,
Attorney for Respondents.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondents. Stipulation. Filed July 22, 1905. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

Order Enlarging Time to File Transcript.

Now, at this day, comes the appellant by A. J. Bruner, Esq., of counsel, and upon the written stipulation of counsel for the appellant and respondents, and thereupon, this cause coming on to be heard upon the motion of said stipulation for the extension of time in which to file the transcript herein, in the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to August 16th, 1905.

ALFRED S. MOORE,

Judge of the District Court, for the District of Alaska, Second Division.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondent. Order Enlarging Time to File Transcript. Filed July 22, 1905. F. D. Monckton, Clerk.

In the United States District Court, in and for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

Complaint.

Plaintiff complains and alleges:

I.

That he is the owner in fee of that certain placer mining claim and ground situated in the Cape Nome Recording District, District of Alaska, and more particularly described as being Marion Bench Claim situated on the right limit of Peluck creek, the same having been located by J. P. Currie on the 12th day of July, A. D. 1899, and the certificate of location of which was recorded on the 10th day of August, A. D. 1899, at page 87, volume 16, Records of Cape Nome Recording District, and which is hereby referred to and made a part hereof.

II.

That on the 5th day of December, 1903, at Nome, Alaska, the said plaintiff made his certain lease of the above-described premises to the above-named defendants in words and figures following:

"MINING CLAIM LEASE.

This indenture, made and entered into this fifth day of December, A. D. 1903, by and between Stanley Kuzek of Nome, District of Alaska, party of the first part, herein called the lessor, and Chas. F. Magaha and Wm. Elliott, of Nome, District of Alaska, party of the second part, hereinafter called the lessee, witnesseth:

That the said lessor, for and in consideration of the royalties to be paid and the covenants to be performed by the said lessee, as hereinafter stated, hereby lease, demise and let *under* the said lessee, Magaha & Elliott, that certain placer mining claim and ground situate in the Cape Nome Recording District, District of Alaska, and known as Marion Bench Claim, on right limit of Peluck creek, located by J. P. Currie on the 12th day of July, A. D. 1899, recorded on 10th day of August, A. D. 1899, at page 87, vol. XVI, in the office and records of the recorder of the Nome Recording District, together with all the rights and privilege of entering upon and over the said property and to prospect the same for gold and the precious metals in whatever deposits the same may be found, and to mine and extract the same.

To have and to hold unto the said lessee for the period of date hereof or until noon of the fifth day of June, A. D. 1904, unless sooner terminated by forfeiture or mutual agreement. In consideration of such lease and privileges the said lessee covenant and agree to and with the said lessor as follows:

First.—To enter upon said mining claim and premises on or before the 10th day of December, A. D. 1903, and to at once begin to prospect and exploit the same for the purpose of discovering thereon placer deposits of gold or other valuable minerals and to continue such work with due diligence as long as the weather and circumstances in the community will permit.

Second.—To work and mine the said premises as aforesaid steadily and continuously from the date of such entry with at most eight men employed thereon continuously working at least eight during the months of working seasons.

Third.—To work said mining claim and premises, hereby leased, in the most practicable manner known to good mining in said district, and to such extent as to develop said property and to produce therefrom the greatest values in ores and minerals.

Fourth.—To pay the said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904, with privileges to sluice what dumps they have left. And that the lessor may have due and sufficient notice of all cleanups and be present in person or by his legal representatives at each and every cleanup.

Fifth.—To deliver the said premises with the appurtenances and all improvements, except machinery placed thereon, to said lessor in good order and condition at the expiration of this lease.

The right is reserved by the said lessor to enter upon and over said property at all reasonable times for the

purpose of inspection and for the purpose of obtaining access to and from any other property owned or operated by the said lessor.

This lease and the privileges hereby granted shall not be assignable, except with the consent of the said lessor, and in the event of a sale of the above described property, this lease shall at once cease and determine upon the payment by the said lessor to the said lessee — per cent of the sale price of the said property.

In witness whereof, we have hereto set our hands and seals this fifth day of December, A. D. 1904.

STANLEY KUZEK.
CHAS. F. MAGAHA.
WM. ELLIOTT,
Party Second Part.

Signed, sealed and delivered the presence of:
Mrs. BERTHA KUZEK."

III.

That under and in pursuance of the provisions of said lease the above-named defendants entered into the possession of the above-described premises on or about the 10th day of December, 1903, and ever since said time have been in the possession of the same and working and mining and operating the same, and have extracted therefrom a large quantity of gravel and earth containing gold in large quantities therein.

IV.

That on or about the 18th day of May, 1904, the above-named defendants began sluicing and washing the

aforesaid auriferous gravel and earth for the purpose of obtaining the gold therefrom, and have since said time continually sluiced said dumps to as great an extent as the water would permit.

V.

Plaintiff further alleges that on the 23d day of May, 1904, the above-named defendants, having made a clean-up of 54 8-160 ounces of gold from the above-described dumps upon said premises, in company with the plaintiff, carried the same to the Alaska Banking and Safe Deposit Company's office in Nome for the purpose of having the same assayed and selling the same to said bank and dividing the proceeds thereof between the plaintiff and the defendants. That since said 23d day of May, 1904, said defendants have continued to sluice the aforesaid dumps upon said premises, and upon this 28th day of May, 1904, brought into the town of Nome, in company with this plaintiff, about 35 pounds of gold. That said golddust so taken out by said defendants and brought to the town of Nome, as aforesaid, was of the value of about $8,525.00.

VI.

Plaintiff further alleges that on both the above-named occasions, the 24th day of May, 1904, and the 28th day of May, 1904, he demanded that the said defendants pay and deliver to him the amount of gold coming to him under the provisions of said lease, to wit, 75 per cent of the gross amount thereof, to wit, the sum of about $6,057.00. That upon making said demand the above-

named defendants refused to make a division of said golddust with the plaintiff, but on the contrary, refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust or the proceeds thereof; and upon his making further demand, that on this 28th day of May, 1904, the said defendants took all of said golddust from his possession by means of force and arms, and have threatened to, and unless restrained by the order of this Court, will convert the entire proceeds thereof to their own use.

VII.

Plaintiff further alleges that at the time he made said demand for his proportion of the proceeds resulting from said cleanups, to wit, the amount of 75 per cent thereof, that both of said defendants set upon the plaintiff and beat and wounded and knocked him down, and refused to deliver any portion of said proceeds thereof to this plaintiff.

VIII.

Plaintiff further alleges that the remaining dumps upon said above-described premises are very rich and valuable on account of the large deposits of gold contained therein amounting in the aggregate to about the sum of $30,000.00. That the above-named defendants threaten to continue to sluice and extract the gold from said dumps and threaten to, and unless restrained by the order of this Court, will extract all the gold therefrom and will exclude the plaintiff from his just proportion thereof, to wit, the amount of 75 per cent thereof; and if the said defendants are not restrained by the order

of this Court, that they will wholly waste and destroy the entire value of said dumps and this plaintiff's estate and interest therein, and effect upon this plaintiff great injury and irreparable damage.

IX.

Plaintiff further alleges that he has no plain, speedy or adequate remedy at law.

X.

Plaintiff further alleges that the defendants and each of them are insolvent, being utterly without any property whatsoever, other than the gold that they have taken out from the premises owned by the plaintiff, or is now contained in the dumps set forth and described herein.

XI.

Plaintiff further alleges that he has performed all the conditions on his part to be performed contained in said lease.

Wherefore plaintiff prays:

1st. For the recovery of the possession of 75 per cent of the gross proceeds of gold already taken from said premises.

2d. That this Court issue an injunction against the said defendants and each of them restraining the said defendants, their attorneys, servants, employees, agents and all persons in privity with them, or either of them, from sluicing the aforesaid dumps or extracting the gold therefrom until the final hearing of this cause.

3d. That an accounting be had of the gold already extracted by the defendants, and that the said defendants be adjudged and decreed to deliver to this plaintiff 75 per cent of all gold so taken and extracted from said dumps by the said defendants or by any other persons or employees on their behalf.

4th. That the plaintiff be adjudged and decreed to be the owner of 75 per cent of all the gold which now is deposited in said dumps.

5th. Plaintiff prays that a receiver may be appointed by this Court to take charge of the dumps described in plaintiff's complaint and to protect the same during the pendency of this action, and to dispose of the same according to the judgment and decree of this Court.

6th. Plaintiff prays for general relief.

A. J. BRUNER,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says:

I am the plaintiff in the above-entitled action and have read the foregoing, my complaint, know the contents thereof, and the same is true, as I verily believe.

STANLEY KUZEK.

Subscribed in my presence and sworn to before me this 28th day of May, 1904.

[Notarial Seal] A. J. BRUNER,

Notary Public in and for the District of Alaska, Residing in said District.

[Endorsed]: No. 1122. In the United States District Court, District of Alaska, Second Division. Stanley Kuzek, plaintiff, vs. Chas. F. Magaha and Wm. Elliott, defendants. Complaint. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska, May 28, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff.

In the United States District Court, in and for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

Summons.

The President of the United States of America to Chas. F. Magaha and Wm. Elliott, Defendants, Greeting:

You and each of you are summoned and required to appear and answer the complaint of plaintiff as filed in the office of the clerk of said Court at the city of Nome

in said District within thirty days from the service of this summons upon you or judgment for want thereof will be taken against you. And you are further hereby notified that if you fail to answer the said complaint, the plaintiff will apply to the Court for the relief demanded therein.

Witness the Honorable ALFRED S. MOORE, Judge of the United States District Court, in and for the District of Alaska, Second Division, and the seal of said Court affixed this 28th day of May, A. D. 1904, and in the independence of the United States one hundred and twenty-eighth.

[Court Seal] GEO. V. BORCHSENIUS,
Clerk of the United States District Court, in and for the District of Alaska, Second Division.

By Jno. H. Dunn,
Deputy.

United States of America,
District of Alaska,
Second Division.

I hereby certify that I received the annexed summons on the 28th day of May, 1904; and thereafter, on the 29th day of May, 1904, I served the same, at the Marion Bench Claim on Peluck creek, Alaska, upon Chas. F. Magaha and Wm. Elliott, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 31st day of May, 1904.

FRANK H. RICHARDS,
United States Marshal.
By Geo. W. Comerford,
Deputy.

[Endorsed]: No. 1122. United States District Court of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Summons. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. May 31, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff.

In the United States District Court in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

Answer.

Comes now the defendants in the above-entitled action and answering plaintiff's complaint, allege and deny as follows:

I.

Deny that on the 5th day of December, 1903, at Nome, Alaska, the plaintiff made his certain lease of the premises described in the complaint in the words and figures as set forth in paragraph II of plaintiff's complaint.

Further answering paragraph II, the defendants allege that on or about the 18th day of November, 1903, the plaintiff, Stanley Kuzek, agreed with the defendants orally to allow them to prospect a few days on the placer mining claim mentioned in plaintiff's complaint with a view of letting defendants have a lay on said premises. That after defendants had prospected a few days, and on or about the 20th of November, 1903, the plaintiff and defendants agreed that the defendants might continue working said property on a lay of 25 per cent to the owner and 75 per cent to the defendants. That thereafter and on or about the 11th day of December, 1903, defendants commenced working continuously on said claim with boiler and thawing apparatus under and in pursuance of said oral agreement; and thereafter continued to work, operate and mine said property and extract dirt therefrom, but without sluicing the same, until on or about the 4th day of March, 1904. That prior to the 4th day of March, 1904, there was no written contract or lease entered into between the plaintiff and defendants in relation to working, mining or operating said property. That on or about said 4th day of March, 1904, the plaintiff and defendants agreed to reduce said oral lay to writing the thereupon the defendant Elliott, using a blank form of lease, drew up a lay lease of said premises

substantially in words and figures as set forth in paragraph II of plaintiff's complaint save and except that said lay lease, so drawn up by the defendant Elliott, provided for the payment of 25 per cent of the gross output of said claim to plaintiff, Stanley Kuzek, lessor, instead of 75 per cent as stated in the alleged lease, set forth in paragraph II of plaintiff's complaint. That said lease so drawn up by defendant Elliott which provided for the payment of 25 per cent of the gross output of said claim to said Stanley Kuzek instead of 75 per cent was on said 4th day of March, 1904, actually signed by plaintiff and defendants and delivered to defendants, and is and was at all times herein mentioned the original lease entered into in writing between the parties hereto. That at the request of said plaintiff Stanley Kuzek, the said lease, was by the parties hereto dated back so as to appear to have been entered into and executed on the 5th day of December, 1903, although the same was never drawn up, signed, executed or delivered until said 4th day of March, 1904. That after said 4th day of March, 1904, continuously until the injunction was issued in the above-entitled action, said defendants have continued to work, mine and operate said mine and mining claim in said complaint described, under and pursuant to said original lease aforesaid.

That afterwards and on or about the 3d day of April, 1904, at the request of the said Stanley Kuzek, the said defendant Elliott drew up a duplicate or copy of said lease, to be retained by the plaintiff Kuzek; that in drawing up said duplicate or copy, defendant Elliott used the

same kind of a printed blank as was used by him for said original lease, but in copying and drawing the same he erroneously wrote in the words "75 per cent" to be paid to the lessor, instead of "25 per cent" which was written in said original lease. That said copy or duplicate of said lease so drawn up on said 3d day of April, 1904, in which said mistake was made as aforesaid was signed by the plaintiff and defendants and delivered to said Kuzek; and the defendants allege on their information and belief that said duplicate copy of said lease is the document set forth in paragraph II of plaintiff's complaint. That in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff. That the mistake made by plaintiff and defendants in copying and signing said lease was mutual, and was inadvertently made by the defendant Elliott in copying said original lease, and was not known to either the plaintiff or defendants until considerable time afterwards. That said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them, but by said mistake and inadvertence aforesaid, it was made to ap-

pear thereby that the plaintiff, lessor, was entitled to 75 per cent of the gross output of said claim, whereas and in fact the true mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent. That it was not intended by drawing up and signing and executing said copy or duplicate lease to change or modify in any particular the original lease in writing, entered into between the parties aforesaid.

Defendants further allege that said original lease so signed, entered into and executed by plaintiff and defendants on said 4th day of March, 1904, has been by the defendants inadvertently lost or mislaid, and for that reason they cannot produce the same. That said original lease was, however, in substance the same as the duplicate or copy thereof set forth in plaintiff's complaint, except that it provided for the payment to plaintiff, Kuzek, of 25 per cent instead of 75 per cent of the gross output of said claim.

That defendants have made long, careful and diligent search for said original lease, but are unable to find the same.

II.

Answering paragraph III of plaintiff's complaint defendants deny that under or pursuant to the provisions of the lease set forth in paragraph II of plaintiff's complaint, the defendants entered into the possession of the above-described premises on or about the 10th day of December, 1903, or at any other time.

Further answering paragraph III the defendants allege that they originally entered into the possession of said property under and in pursuance to the oral agreement heretofore alleged, and have ever since said time been in the possession of the same and working and mining and operating the same and have extracted therefrom large quantities of earth containing gold in large quantities, under and pursuant to said oral lease as originally entered into, and subsequently, pursuant to said original lease in writing entered into between the parties on or about the 4th day of March, 1904, as hereinbefore alleged.

III.

Answering paragraph V the defendants admit that on the 23d day of May, 1904, the above-named defendants, having made a clean-up of 54 8/100 ounces of gold from said claim described in plaintiff's complaint, in company with the plaintiff carried the same to the Alaska Banking and Safe Deposit Company's office in Nome for the purpose of having the same assayed and selling the same to said Bank and dividing the proceeds between the plaintiff and defendants.

Defendants further admit that since the 23d day of May, 1904, they have continued to sluice the dumps of pay gravel on said premises, and that on the 28th day of May, 1904, they brought into the town of Nome, in company with this plaintiff, a quantity of gold, the exact amount of which is unknown to defendants, but which they allege to be between 10 and 15 pounds.

The defendants deny that said quantity of gold is 35

pounds of gold but allege that they are unable to allege the exact quantity of the same, for the reason that the same has not been weighed.

Defendants deny that said golddust, taken out by them and brought to town, was of the value of about $8,825.00, and further allege that having never weighed the same, they have no knowledge or information sufficient to form a belief as to the exact value of the same, but allege the value to about $3,000.00 and no more.

IV.

Answering paragraph VI of plaintiff's complaint, defendants admit that on both occasions, to wit, the 24th day of May, and the 28th day of May, 1904, the plaintiff demanded that the defendants pay and deliver to him 75 per cent of the gross output of said claim; and defendants further admit that they refused to make such a division of the golddust with the plaintiff and refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust or the proceeds thereof.

Defendants deny that upon making further demand upon the 28th day of May, 1904, the defendants took all of said golddust from the plaintiff's possession by means of force or arms or have threatened to or will, unless restrained by order of Court, convert the entire proceeds thereof to their own use.

Further answering said paragraph VI, the defendants allege that the first lot of golddust cleaned up upon said premises, amounting to 54-8/100 ounces, has been de-

livered to and is now in the possession of the Alaska Banking and Safe Deposit Company in Nome, Alaska.

That on the 28th day of May, 1904, when the defendants refused to pay or deliver to said Kuzek more than 25 per cent of the last lot of golddust, amounting, as aforesaid, to about 10 or 15 pounds, the plaintiff, Kuzek, forcibly and unlawfully, grabbed the same out of the hands of defendant Magaha and the defendants, Magaha and Elliott, without any unnecessary force or violence, retook the same from the said Kuzek and now have the same in their possession.

V.

Answering paragraph VII of plaintiff's complaint, defendants deny that at the time therein mentioned, or at any time, the defendants sat on plaintiff or beat or wounded or knocked him down or refused to deliver any portion of said proceeds to plaintiff; and further answering said paragraph, defendants allege that they used no more force and violence toward the plaintiff, Stanley Kuzek, than was necessary to retake from his possession the said quantity of golddust which he had forcibly and unlawfully grabbed out of the hands of said defendant Magaha.

VI.

Answering paragraph VIII of plaintiff's complaint, defendants admit that the remaining dumps on said premises, described in plaintiff's complaint, are rich in value on account of the large deposits of gold contained therein, and admit that the defendants would have con-

tinued to sluice and extract the gold from said dumps had they not been restrained by order of Court; but the defendants deny that they would have excluded the plaintiff from his just portion thereof, and deny that if said defendants are not restrained by an order of this Court, that they will wholly waste or destroy, or waste or destroy at all the entire value of said dump, or the plaintiff's estate or interest therein, or will effect upon plaintiff great or irreparable or any injury or damage whatever.

VII.

Answering paragraph IX of plaintiff's complaint, defendants deny that the plaintiff has no plain, speedy or adequate remedy at law.

VIII.

Answering paragraph X of plaintiff's complaint, defendants deny that they or either of them are insolvent or that they are utterly without any property whatever other than the gold that they have taken out of the premises owned by plaintiff or contained in the dumps described in plaintiff's complaint.

IX.

Answering paragraph XI of plaintiff's complaint, defendants deny that the plaintiff has performed all the conditions on his part to be performed, as contained in the lease of said premises from plaintiff to defendants. Defendants further allege that they have at all times fully and faithfully performed all the covenants and

agreements of the lease of said premises by plaintiff to defendants.

X.

Further answering plaintiff's complaint, defendants allege that they have been at all times, and now are ready and willing to fully and faithfully perform each and every covenant of said original lease of the premises described in plaintiff's complaint so drawn up, signed, and executed on or about the 4th day of March, 1904, as hereinbefore set forth.

That by reason of the issuance of the injunction herein the defendants have been prevented from the 28th day of May, 1904, from sluicing up the dumps of pay dirt on said premises, and that unless said injunction be immediately dissolved, said defendants will not be able to sluice up and extract any gold therefrom until the opening of the summer season in the year 1905, except at great expense in pumping water. That by reason of having been enjoined from sluicing up said dumps since the 28th day of May, 1904, when the water from the melting snow runs, the defendants have been and still are prevented from taking any advantage of said snow water, and will be, unless said injunction is immediately dissolved, entirely prohibited from sluicing up said dumps, except at great expense, as aforesaid. That if no injunction had been issued herein, the defendants by means of the water from the melting snow, would have been able to completely sluice and clean up said dumps before the 5th day of June, 1904.

Wherefore the defendants pray:

1st. That the injunction heretofore issued herein be dissolved.

2d. That the Court, by its decree herein, correct said duplicate or copy of a lease between plaintiff and defendants, by changing the words "75 per cent" therein to "25 per cent," in so far as said duplicate or copy of said lease may in any way affect the rights of plaintiff and defendants.

3. That the Court adjudge and decree that the defendants are entitled to 75 per cent of the gross output of said dumps of pay gravel extracted by them from the premises described in plaintiff's complaint, and that the plaintiff is entitled to 25 per cent.

4. That the Court adjudged and decreed that the defendants be allowed to continue in possession of said premises and sluice and clean up said dumps of pay gravel, aforesaid, and retain therefrom 75 per cent of the gross amount of gold produced therefrom.

6th. That the defendants have judgment for their costs and disbursements herein and for all other relief, which they may be in equity entitled.

IRA D. ORTON,
Attorney for Defendants.

United States of America,
District of Alaska. } ss.

Charles F. Magaha and Wm. Elliott, being each first duly sworn, deposes and say:

That they are the defendants in the above-entitled action; that they have heard read the foregoing, their an-

swer, and know the contents thereof, and that the same is true as they verily believe.

CHAS. F. MAGAHA.
WM. ELLIOTT.

Subscribed in my presence and sworn to before me this 31st day of May, 1904.

[Notarial Seal] JAS. W. BELL,
Notary Public in and for the District of Alaska, Residing at Nome.

Received copy of the within answer this May 31st, 1904.

A. J. BRUNER,
Attorney for Plaintiff.

[Endorsed]: Original. No. 1122. In the United States District Court, for the District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Answer. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division at Nome, Alaska. Jun. 1, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. Ira D. Orton, Attorney for Defendants. Filed Jun. 1/04.

In the United States District Court for the Second Division of the District of Alaska.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

Amendment to Complaint.

Now comes the plaintiff, and by leave of the Court first had and obtained, files this his amendment to the complaint on file herein:

Strike out the first four lines of paragraph two of the complaint, and insert in lieu thereof the following:

"That on or about the 5th day of December, 1903, at Nome, Alaska, the said plaintiff leased the above-described premises to the above-named defendants, and that thereafter and on or about the 9th day of March, 1904, the said lease was reduced to writing by the parties, and the said lease was and is in the words and figures as follows, to wit."

A. J. BRUNER,
ELWOOD BRUNER,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says: That he has read the amendment to the original complaint, and that the same is true as he verily believes; that the said Kuzek is the plaintiff in said action.

STANLEY KUZEK.

Subscribed and sworn to before me this 11th day of July, 1904.

[Notarial Seal] G. J. LOMEN,
Notary Public, Alaska.

[Endorsed]: 1122. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha et al., Defendants. Amendment to Original Complaint. Filed in the office of the clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. July 11, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, and Elwood Bruner, Plaintiff's Attorneys. Filed July 11, 1904.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

Reply.

Comes now the above-named plaintiff, and replying to the new matter contained in defendants' answer, admits, denies and alleges as follows:

I.

Replying to paragraph 1 of said answer, plaintiff admits that he agreed with defendants orally to allow defendants to prospect a few days on the placer mining claim mentioned in plaintiff's complaint, with a view of letting defendants have a lay on said premises, providing they could agree upon the terms of said lay; and admits that afterwards the plaintiff agreed that the defendants might have a lay on said property, but denies that the defendants were to have a lay of 25 per cent to the owner and 75 per cent to the defendants, but alleges the fact to be that 75 per cent of the gross proceeds was to be delivered to plaintiff and the defendants were to retain 25 per cent thereof.

Plaintiff admits that on or about the 11th day of December, 1903, the defendants commenced working

said claim, and afterwards continued to work, operate and mine said property, but denies that it was in pursuance of the alleged oral agreement set forth in defendants' answer, but avers the fact to be that it was under the agreement set forth in plaintiff's complaint; admits that plaintiff and defendants agreed to reduce the oral lay to writing, and that thereupon, on or about the 9th day of March, 1904, the defendant Elliott, using a blank form of lease, drew up a lay lease of said premises in the words and figures set forth in paragraph 2 of plaintiff's complaint; but denies that said lease provided for the payment of 25 per cent of the gross output to plaintiff, lessor, instead of 75 per cent, but avers the fact to be that said lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff;

Admits that the lease as drawn up by defendant Elliott was, on or about the 9th day of March, 1904, actually signed by plaintiff and defendants, and delivered to defendants; but denies that said lease so signed provided for the payment of 25 per cent of the gross output of said claim to plaintiff, but avers the fact to be that said lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff; admits that afterwards, and on or about the 4th day of April, 1904, at the request of the plaintiff, said defendant Elliott drew up a duplicate or copy of said lease to be retained by the plaintiff, Kuzek, and that in drawing up said duplicate or copy of said lease, defendant Elliott used the same kind of a printed blank as was used by him for

said original lease; but denies that in copying or drawing up the same, defendant Elliott erroneously wrote in the words: "75 per cent to be paid to the lessor" instead of "25 per cent," but alleges the fact to be that said duplicate or copy was an exact copy of the original lease mentioned in plaintiff's complaint, and originally signed by the parties to this action; admits that in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties to this action, and admits that at the time the same was signed by the plaintiff and defendants that both the parties hereto believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into by the parties hereto, but denies that said original lease provided for the payment of 25 per cent of the gross output of said claim to plaintiff, but avers the fact to be that said original lease provided for the payment of 75 per cent of the gross output of said claim to the plaintiff; denies that any mistake was made either by plaintiff or defendants in copying or signing said lease, and avers the fact to be that there was never any discovery made by either the plaintiff or defendants, either a considerable time afterwards or at any time of any mistake having been made in copying said lease.

Plaintiff denies that "said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them," or denies "that any mistake or inad-

vertence was made by which it was made to appear that the plaintiff was entitled to 75 per cent of the gross output of said claim, but that in truth and in fact the mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent."

Admits that it was not intended by drawing up and signing and executing said copy or duplicate lease to change or to modify in any particular the original lease in writing entered into by the parties aforesaid, and avers the fact to be that said duplicate copy so written by said defendant Elliott was an exact duplicate and copy of the original lease signed by all the parties hereto on or about the 9th day of March, 1904.

The plaintiff denies that he has any knowledge or information thereof sufficient to form a belief, and therefore denies that said original lease signed by the parties hereto has been by the defendants, or either of them, inadvertently lost or mislaid, or that they cannot produce the same; admits that said original lease was an exact copy of the duplicate lease in plaintiff's possession, and denies that said original lease provided for the payment to plaintiff of 25 per cent, instead of 75 per cent, of the gross output of said claim, but on the contrary alleges the fact to be that said original lease provided for the payment of 75 per cent of the gross output of said claim to plaintiff; denies that defendants have made long and careful or diligent search for said original lease, or that they are unable to find the same.

II.

Plaintiff replying to paragraph 2 of said defendant's answer, denies that the defendants entered into the possession of the said property under or in pursuance of the oral agreement set forth in defendant's answer; but that said defendants entered into possession of said premises and worked and mined the same under the provisions of, and in pursuance of the lease set forth in plaintiff's complaint.

III.

Replying to paragraph 3 of defendants' answer, plaintiff admits that on the 28th day of May, 1904, defendants brought into the town of Nome, in company with plaintiff, a quantity of gold; but denies that the exact amount of said gold is not known to said defendants, and denies that it was between 10 and 15 pounds of gold, but on the contrary avers the fact to be that there were about 35 pounds of gold; denies that said gold was only of the value of about $3,000; but alleges the fact to be that it was of about the value of $8,525.00.

IV.

Plaintiff replying to paragraph 4, denies that he, the said plaintiff, forcibly or unlawfully grabbed the same out of the hands of the defendant, Magaha, but alleges that both the plaintiff and defendant Magaha had hold of the poke containing said gold at the same time; admits that the defendants Magaha and Elliott retook the same from this plaintiff and the said Magaha, and now

have the same in their possession; but deny that they took the same without any force or violence, but on the contrary alleges that they used more force and violence than was necessary and hit and unnecessarily beat and wounded this plaintiff.

V.

Plaintiff, replying to paragraph 5 of defendants' answer, denies that they used no more force or violence toward the plaintiff than was necessary to retake from the said plaintiff the said quantity of golddust, and denies that he forcibly or unlawfully grabbed the same out of the hands of the said defendant Magaha, but allege the fact to be that he took hold of the said poke and was thereupon set upon and was beaten and wounded by said defendants.

VI.

Replying to paragraph 9 of defendants' answer, denies that defendants have at all times fully and faithfully performed all the covenants or agreements of the said lease of said premises by plaintiff to said defendants.

VII.

Replying to paragraph 10 of defendants' answer, plaintiff admits the issuance of the injunction and the prevention of the defendants from sluicing up the dumps, unless they would agree to the appointment of a receiver; plaintiff avers the fact to be that immediately after the issuance of the injunction he offered to stipulate that a receiver might be appointed by the Court at

small expense to the parties hereto, and that if said receiver had been appointed that said dumps upon said premises might have been fully sluiced up with the surface water now running with very small cost to the parties hereto; that said defendants refused to stipulate for the appointment of a receiver, and by so doing have themselves prevented the sluicing up of said dumps.

Wherefore, plaintiff having fully replied to defendants' answer, prays judgment as set forth in his complaint.

A. J. BRUNER,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

Stanley Kuzek, being first duly sworn, deposes and says: I am the plaintiff above named; I have read the foregoing, my reply, and know the contents thereof; the same is true, as I verily believe.

STANLEY KUZEK.

Subscribed and sworn to before me this 3d day of June, 1904.

[Notarial Seal] J. F. HOBBES,
A Notary Public in and for the District of Alaska.

Service of the within by copy acknowledged this 4th day of June, A. D. 1904.

IRA D. ORTON,
Attorney for Defendants.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha et al., Defendants. Reply. Filed in the office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. June 4, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner, Attorney for Plaintiff

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In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

Bill of Exceptions.

Be it remembered that on the 11th day of July, 1904, the above-entitled cause came on for trial before the Honorable Alfred S. Moore, without a jury; the plaintiff appearing by A. J. Bruner and Elwood Bruner, his counsel, and the defendants appearing by Ira D. Orton and John L. McGinn, their counsel, and the following proceedings were had and testimony taken:

Plaintiff then offered in evidence the report of the receiver heretofore appointed in this case, showing that

the property in controversy in this cause was 625.67 ounces of gold, and 366 86-100 dollars in money on deposit with the Alaska Banking and Safe Deposit Company of Nome, Alaska, subject to the final disposition of said cause.

Defendants offered no objection, and the report was admitted in evidence.

Mr. Elwood Bruner made a statement of the case, and the following proceedings were had:

I would ask you, Mr. Orton, if you have the paper I asked you for the other day, that is, what you say or claim to be the original lease.

Mr. ORTON.—It is explained in the answer very fully that that has been lost.

Mr. BRUNER.—I ask counsel to produce it if they have it now, and if they haven't to so state.

Mr. ORTON.—We haven't got it in court; there is no question about that.

Mr. BRUNER.—I ask you if you have it in your possession.

Mr. ORTON.—No, we haven't got it in our possession, or under our control, or never have had it.

Mr. Bruner then offered in evidence the duplicate lease set out in paragraph 2 of the complaint signed and executed on the 4th day of April, to which offer objection being made it was temporarily withdrawn.

And thereupon, BERTHA KUZEK, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

A paper was thereupon handed to the witness: "I am the Bertha Kuzek whose name is signed to this paper as a witness; that is my signature as a witness; I know the signatures of the parties to the instrument and saw them sign the paper."

Plaintiff then offered in evidence the duplicate lease set out in the complaint, and objection being made thereto by defendants' counsel, the plaintiff thereupon, by his counsel, asked leave of the Court to amend the complaint as follows:

"Strike out the first four lines of paragraph 2 of the complaint, and insert in lieu thereof the following: 'That on or about the 5th day of December, 1903, at Nome, Alaska, the said plaintiff leased the above-described premises to the above-named defendants, and that thereafter, and on or about the 9th day of March, 1904, the said lease was reduced to writing by the parties, and the said lease was and is in the words and figures, to wit:' "

Mr. McGINN.—We object to the proposed amendment of plaintiff to their complaint on the ground—

1st. That the allegations are too general, and on the further ground that it is a complete change of the issues that are set forth in the original complaint, and

(Testimony of Mrs. Bertha Kuzek.)

is at variance with the relief that was sought to be obtained in the original complaint, and the further reason that the amended complaint fails to state what the agreements were that were entered into on the 5th day of December, 1903.

The COURT.—We overrule the objection and permit the amendment.

Mr. ORTON.—We ask an opportunity to file an answer to it. "We admit, of course, that on or about the 5th of December, 1903, the plaintiff did lease the premises to the defendants, and also that thereafter and on or about the 4th day of March, the lease was reduced to writing; but, of course, we will deny that it was in words and figures as set forth in the complaint."

Permission to file an answer to the amendment was granted by the Court, without objection.

And thereupon, the Court overruled defendants' objection, and the duplicate lease offered by plaintiff was admitted in evidence, and marked Plaintiff's Exhibit No. 2, which was and is in the words and figures following:

Plaintiff's Exhibit No. 2.

MINING CLAIM LEASE.

This indenture, made and entered into this fifth day of December, A. D. 1903, by and between Stanley Kuzek, of Nome, District of Alaska, party of the first part, hereinafter called the lessor, and Chas. F. Magaha and Wm.

(Testimony of Mrs. Bertha Kuzek.)

Elliott, of Nome, District of Alaska, party of the second part, hereinafter called the lessee, witnesseth:

That the said lessor, for and in consideration of the royalties to be paid and the covenants to be performed by the said lessee, as hereinafter stated, hereby lease, demise, and let unto the said lessee, Magaha & Elliott, that certain placer mining claim and ground situated in the Cape Nome Recording District, District of Alaska, and known as Marion Bench Claim on Right Limit of Peluk creek, located by J. P. Currie on the 12th day of July, A. D. 1899, recorded on the 10th day of August, A. D. 1899, at page 87, volume XVI, in the office and records of the Recorder of the Nome Recording District.

Together with all the rights and privileges of entering upon and over the said property and to prospect the same for gold and the precious minerals in whatever deposits the same may be found, and to mine and extract the same.

To have and to hold, unto the said lessee, for the period of ——— from date hereof or until noon of the fifth day of June, A. D. 1904, unless sooner terminated by forfeiture or mutual agreement. In consideration of such lease and privileges the said lessee covenant and agree with and to said lessor as follows:

First.—To enter upon said mining claim and premises on or before the 19th day of December, A. D. 1903, and to at once begin to prospect and exploit the same for the purpose of discovering thereon placer deposits

(Testimony of Mrs. Bertha Kuzek.)

of gold or other valuable minerals, and to continue such work with due diligence as long as the weather and circumstances in the community will permit.

Second.—To work and mine the said premises as aforesaid steadily and continuously from the date of such entry, with at most eight men employed thereon continuously, working at least eight during the months of working seasons.

Third.—To work said mining claim and premises hereby leased in the most practical manner known to good mining in said district, and to such extent as to develop said property and to produce therefrom the greatest value in ores and minerals.

Fourth.—To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904, with privileges to sluice what dumps they have left, and that the lessor may have due and sufficient notice of all cleanups and be present in person or by his legal representatives at each and every cleanup.

Fifth..—To deliver the said premises, with the appurtenances and all improvements, except machinery placed thereon, to the said lessor in good order and condition at the expiration of this lease.

The right is reserved by the said lessor, to enter upon and over said property at all reasonable times for the purpose of inspection and for the purpose of obtaining access to and from any other property owned or operated by the said lessor.

(Testimony of Mrs. Bertha Kuzek.)

This lease and the privileges hereby granted shall not be assignable except with the consent of the said lessor, and in the event of a sale of the above-described property this lease shall at once cease and determine upon the payment by the said lessor to the said lessee ——— per cent of the sale price of said property.

In witness whereof, we have hereunto set our hands and seals this fifth day of December, A. D. 1904.

STANLEY KUZEK.
CHAS. F. MAGAHA.
WM. ELLIOTT.
Party Second Part.

Signed, sealed and delivered in the presence of:
Mrs. BERTHA KUZEK.

And thereupon plaintiff rested his case.

Mr. McGINN.—We move that the plaintiff be not sustained, for the reason that the plaintiff has failed to establish the allegations set forth in their complaint, in this: That they have failed to establish the terms of the agreement that was entered into by these persons on the 5th day of December, 1903, and for the further reason that they have failed to show that the defendants in this action entered into possession of this property under the terms of the agreement, that they have introduced in evidence here, or that they entered into possession of said property under the agreement made on the

5th day of December, 1903, as that allegation has not been changed in any particular; and the only evidence is that there was an agreement signed by the parties on the 4th day of April, 1903, and that that was a duplicate or copy, of the agreement that was made out on the 4th day of March, 1903; and there is nothing to show in this case that the defendants entered on the ground under and in pursuance of the terms of this agreement introduced here, and it appears to me that the evidence is wholly insufficient."

After argument the Court overruled the motion made on behalf of the defendants.

And thereupon WILLIAM ELLIOTT, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I am one of the defendants in this case; I have known Mr. and Mrs. Kuzek since June, 1903; I am acquainted with the Marion Bench claim, the same claim mentioned in plaintiff's complaint, situated on Peluk creek; I am the same William Elliott that signed the duplicate lease known as Plaintiff's Exhibit No. 2; it was also signed by Charles Magaha, my codefendant; it was written out and signed by me on the 4th of April, as near as I can guess—that is, I am not sure of the date; as near as I think; it was signed the 5th by Charley, my partner, the next morning; another paper similar in form to that and upon the same subject matter was signed by the same parties about a month prior to this one. Both the orig-

(Testimony of William Elliott.)

inal, which was written on the 4th of March, and the duplicate, which was written on the 4th day of April, are entirely in my handwriting.

It was thereupon agreed by counsel and the Court that each and every ruling of the Court during the trial of the case should be deemed duly excepted to.

Q. In reference to this original lease so called the first one that was signed, what was done with it after it was signed?

Mr. BRUNER.—We object to the question on the ground that it is irrelevant, immaterial and incompetent.

The COURT.—The objection is overruled.

A. I brought it up to town and turned it over to Mr. Taylor, of the Beau Mercantile Company.

Mr. BRUNER.—I move to strike the answer out as irrelevant and incompetent.

Mr. ORTON.—I am proving the loss.

The COURT.—Objection overruled.

A. I turned it over to Mr. Taylor inside of two or three hours after it was signed; it was the same identical lease that was signed about the 4th of March, by myself, Magaha and Kuzek.

Q. What did Mr. Taylor do with the lease, if anything while you were there?

Mr. ELWOOD BRUNER.—I object to the question as immaterial, irrelevant and incompetent, for the reason that he must come to the last time the lease was seen.

(Testimony of William Elliott.)

The COURT.—You don't need to follow it through all the successive hands.

Mr. ORTON.—I propose to produce the witnesses here; I want to identify the instrument as being the same identical lease; I propose to produce Mr. Taylor here, and I want to show why this man left it there, and that Mr. Taylor read it.

Mr. BRUNER.—That is not the intention of this evidence; it is to show the loss of the instrument.

Mr. ORTON.—I propose to show the loss; I can put in my evidence in different parts, or all together.

Mr. BRUNER.—I don't think that that is the orderly way. That would require an absolutely different argument when it comes to what Mr. Taylor or anybody else did; the only question before the Court is, to prove the loss of the instrument; that is what we have been arguing this morning.

The COURT.—I suppose you wish to show that it passed through Mr. Taylor's hands, and he had a chance to examine it?

Mr. ORTON.—I expect to, and he did examine it.

The COURT.—The objection is overruled.

A. He examined it. Mr. Taylor then took it to Mr. Cowden, and I went with him.

Q. What did Mr. Cowden do with it?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent, what Mr. Cowden may have done with it.)

(Testimony of William Elliott.)

The COURT.—We will have to allow him to take his own course in putting in this evidence.

A. He examined it. I took it from Mr. Cowden and returned it to Mr. Taylor, who had it three or four days; I next saw it on the 9th of March when we drew the mortgage up. Mr. Taylor took it out of the safe, and it was left with Judge Reed, after the mortgage was drawn up; possibly 4 or 5 o'clock in the afternoon, I took it over to the Hub or to the Hunter Saloon, and Mr. Magaha got it out of my pocket; I saw it next on the 1st day of April, when I got it from Mr. English. It was the same identical paper that was signed on or about the 4th day of March. On the 1st of April, I took it down to the claim, and put it in a box we had to put papers in; it remained there possibly four or five days, when I took it to draw up the duplicate which is now before me. After the duplicate was drawn up I put the original lease in the box again, where it remained until the 7th or 8th of April, when I turned it over to my partner, Magaha, since which time I have never seen it. Since then I have searched for it in Magaha's cabin here, and at the house on the claim; I have made inquiry since, but have never heard of it. Mr. Magaha put it in his inside pocket, and left for Nome; I have never seen it since.

The witness Elliott was then cross-examined by plaintiff's counsel, it being understood that the defendant's counsel should have the privilege of recalling him for further direct examination.

(Testimony of William Elliott.)

Cross-examination.

When I gave the original lease to Mr. Magaha, I did not come to town with him; I gave the paper to him for safekeeping, to put it on record or to put in safety; it was three or four days after we executed the duplicate, when I gave it to him in our house on the Marion Bench claim, and I said: "Take that and see that it is put away, or put on record." It is my best recollection that I told him to put it on record; about the 12th or 14th of April, I came up to town, and Magaha told me that he had lost it; and didn't know where; I told him to stay and look for it; he stayed five or six days, or thereabouts; I didn't ask him if he had placed it on record then; I asked him that afterwards; he said that he didn't know whether he had lost it or mislaid it; he said the last time he saw it was when he put it in his pocket down at the claim.

CHARLES F. MAGAHA, a witness produced on behalf of the defendants, testified as follows:

Direct Examination.

I am one of the defendants; I recognize the paper shown me known as Plaintiff's Exhibit No. 2; I signed it one morning about the 4th of April; I was working nights at that time. There was another paper of similar import to this which was signed by me, and the same parties about the 4th of March; we had it in a box in the cabin on the Marion Bench Claim until about the 7th or 8th of April, when Mr. Elliott handed the paper to me,

(Testimony of Charles F. Magaha.)

and I put it in my pocket; I put it in the outside pocket of an old canvas coat, and started for Nome; it is a mystery to me where it went to; I came to town and stopped in town five or six hours going around from one place to another, and I missed the paper; it was gone; it was several hours after I left the claim before I missed it; I have made search and inquiry for it; and have not seen the paper since; I went around to the different houses that I visited that night, saloons, I inquired in around in them if they had seen it, also the next morning I went down as far as the Standard Oil Company, and I met different people along the street, and asked them if they had seen the paper or picked it up, or saw anybody else pick it up, or anything up, and they told me no. I made search in my cabin in town, and went through all my papers there although I was positive I had never been in the cabin at all until I missed the paper. I also searched through the cabin and around the boiler shed on the claim; also around the dumps; I have looked for the paper where ever I believed there was a possibility of the paper being, and have not been able to find it, or get any trace of it; I have never seen it since the day it was handed to me by Mr. Elliott; do not know where it is now; do not know anybody that does, and have never heard anything of it in any way since that time.

(Testimony of Charles F. Magaha.)

Cross-examination.

I was dressed, ready to come to town, when Mr. Elliott handed the paper to me; after it was handed to me by Mr. Elliott, and I put it in my pocket, I never saw it again; I am sure it was in my pocket when I started for town; several hours afterwards, during the evening, I discovered its loss, and started immediately to find it; my purpose in bringing it to town was to put in Mr. Bob English's residence, but I lost it before I got that far; I had no other business to transact in town. When Mr. Elliott handed me the paper the afternoon I lost it, he said, "Better take this to town; there is a whole lot of trouble going on here; you don't know but what it might be lost." I did not see it on the 23d day of May; the first time I talked with an attorney was about the 28th of May; I do not know whether Mr. Elliott had consulted with an attorney prior to the 28th of May.

Leave was given to recall Mr. Magaha.

WILLIAM ELLIOTT, recalled on behalf of the defendants, testified as follows: I made the written portions of the duplicate on the 4th or 8th day of April; I had the original there; I don't know as I copied it; I laid the paper beside the other one; I thought I knew it well enough to make it out.

Q. (By Mr. ORTON.) I will ask you to examine this paper, particularly with reference to paragraph IV, where it states "To pay to said lessor or his legal rep-

(Testimony of William Elliott.)

resentatives or assigns 75 per cent of the gross output of said claim during," etc. I will ask you whether or not in making the copy you hold in your hand, you correctly copied the other paper.

Mr. ELWOOD BRUNER.—Objected to as immaterial, irrelevant and incompetent, and not the best evidence, the original being here in court.

Mr. ORTON.—I will call your Honor's attention to the fact that it is admitted in the pleadings that it was the intention of both parties to make an exact copy of the original.

Mr. BRUNER.—We allege that it is an exact copy of it.

Mr. ORTON.—That was the intention we are coming down to whether or not there was a mistake made in fact.

The COURT.—The objection overruled.

Mr. BRUNER.—The further objection to it that it is leading.

The COURT.—Objection overruled.

A. I didn't copy this the same as the other one; no, there was a mistake here.

Q. State wherein the mistake was made?

A. Instead of 75 it was 25.

Q. Do you know how you happened to make that mistake?

A. It was an oversight; the only way I can think;

(Testimony of William Elliott.)

where it says "with privileges to sluice what dumps they have left," where it says, "the year ending June 5th, 1904," that was down here in this lower line, next to the lower line right there; there was a vacancy in there of one or two lines that came down here—that was made out this clause—I remember the other one well.

The original paper was upon the same kind of a blank as this one; I made this duplicate paper because I had promised to make one out the next day after making the original; I was never personally acquainted with Mr. Kuzek, until after I went to work there.

Q. When did you first go to work there?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose.

The COURT.—Objection overruled.

A. I went there the latter part of November, 1903, to work.

Q. State whether at that time you had a lay on the Marion Bench Claim?

Mr. BRUNER.—Objected to as irrelevant and incompetent, the circumstances under which the agreement was entered into are admitted by both parties and as to what the original instrument contained is the only question before this Court.

The COURT.—They have recited in their pleadings that they had dealings in November, and entered upon this property to operate it to a certain extent.

(Testimony of William Elliott.)

Mr. BRUNER.—What difference would that make provided their agreement was reduced to writing? The only question as I understand it is, whether or not there was a mistake in the original writing or in this duplicate.

The COURT.—You allege, I believe, in your pleadings, that the agreement which was put in writing on March 4th was in effect, the oral agreement which was entered into in November, you are going back to November, what is the purpose of that?

Mr. ORTON.—That is merely preliminary to show what the character of this ground was. For the purpose of showing that it was a mutual mistake, I want to show that at all times after Mr. Elliott commenced to prospect this property it was orally understood between them that Kuzek was to have 25 per cent and they worked there under that understanding during that entire period, and that about the 4th of March this oral agreement was reduced to writing.

The COURT.—How will that throw any light on the question, as to whether there was a mistake in the copy made April 4th?

Mr. ORTON.—Not that particular point. What we insist on is we are showing what the other original agreement was that he entered into on the 4th day of March; then it would follow as a natural consequence that Mr. Elliott must have made a mistake.

The COURT.—I don't think that is the way. I think you must show it by people that have seen the original

(Testimony of William Elliott.)

evidence, that is the best evidence; the only way you can prove the contents of that original agreement is by the testimony of witnesses who have seen it, or perhaps by admissions.

Mr. ORTON.—It is perfectly proper for me to show what kind of ground this is, the nature of the claim and what we are having this controversy over.

The COURT.—I am not so sure about that.

Mr. ORTON.—I wish to prove by this witness the kind and character of this property, that it is a mining claim, and the character of it in a general way, what kind of a claim it is, and whether any pay had been discovered on it.

The COURT.—I understand the tendency of this testimony, which is indicated by this question, that you want to prove that it is likely that the agreement is as you contend it was, and contained 25 per cent royalty, instead of 75.

Mr. ORTON.—Yes, that is one way to put it.

The COURT.—I don't think that is the way to prove the contents.

Mr. ORTON.—I didn't have any idea that I could prove the contents but it is a circumstance—I propose to prove that by witnesses that saw the paper and I also wish to introduce additional evidence to show that these men's witnesses are telling the truth about it.

The COURT.—As I understand it, you propose to call

(Testimony of William Elliott.)

witnesses here to testify as to having seen this original agreement, and thereby to show its contents. Then you want to go a step farther and to show that it must be correct, their recollections, because the agreement is a reasonable one. We will close this whole matter just now and at this time we will require you to offer your direct evidence as to the mistake, and as to the circumstances offered we will defer that for a later consideration.

Mr. ORTON.—It is understood that we will have a further opportunity to offer it?

The COURT.—I will give you a chance later on, if the rules of law will permit you to offer the circumstances by way of showing the reasonableness of the agreement, for which you contend then it can be admitted.

Mr. BRUNER.—Then at this time I submit to the counsel for the defendants a draft of this agreement, made the day when the original agreement was executed. I state to the counsel for the other side and having shown them a paper which is better evidence that the evidence which they have sought to introduce as to what the original document contained; it is my understanding it is the duty of the Court to require the best evidence.

The COURT.—Maybe they do not wish to avail themselves of it.

Q. Mr. Elliott, referring to that original agreement, from which you state you copied the one that is here in

(Testimony of William Elliott.)

court, will you please state to the Court how many different persons and what their names are you ever showed that original paper to?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and for the further reason that it is not the best evidence, because it appears to the Court that there is better evidence within the possession or reach of the attorneys for the defendants, to wit, the abstract of the contract which was made on the same day the original was executed.

The COURT.—You can make what use you see fit of that paper you refer to. The objection is overruled.

A. Yes. I first showed that to Mr. Taylor and Mr. Cowden along about 3 o'clock in the afternoon of the day I drew it up; I next showed it to Judge Reed; he examined and drew a mortgage up from it; I also showed it to Fred Strelke and Mr. Cowden, cashier or manager of the Alaska Banking and Safe Deposit Company; he kept it three or four minutes, long enough to see the columns, items and different things. Judge Reed had it in my presence on the table when he drew up the mortgage; and every once in a while he would look at it, and have to read something in it; I was standing right over him. On another occasion I showed it to Mr. Strehlke. Mr. Strehlke had the paper in his hand possibly 5 minutes; he just read it over; he asked to see it and I handed it to him for the benefit of the boys who were working; he was looking up and down it; that was about the time

(Testimony of William Elliott.)

I drew up the duplicate on the 3d or 4th of April; the paper which I exhibited to Mr. Taylor, Judge Reed, Fred Strehlke and Mr. Cowden was the same paper which has been referred to as the original paper executed on the 4th of March and was signed by myself, Mr. Magaha and Mr. Kuzek and Mrs. Kuzek as a witness.

Cross-examination.

By Mr. A. J. BRUNER.—I made this duplicate on the 4th day of April, there were present myself, and Mr. and Mrs. Kuzek, in their house; I was seated at an ordinary eating-table near to the two windows; I do not know where they were sitting at the time; I took about five or ten minutes in copying this duplicate; I was in a hurry, I didn't want to make a copy that night, and I told him so; I had the original on the table at the time; I couldn't say that I looked at it; I thought I was familiar enough to write it up; I wouldn't say whether I examined it or not; I certainly did care whether or not the duplicate was an exact copy; I certainly know that I wrote that out that evening.

(Witness was here handed a draft of a lease claimed to have been made on the same day the original lease was executed.)

Q. At that time did you have this paper, did you see this paper there at that time?

A. No, that one was never produced at that time.

Q. I will ask you to look that over.

(Testimony of William Elliott.)

A. I remember when that—this was with the first one.

Q. Who wrote that?

A. I wrote the lower part.

Q. Who wrote this here?

A. I don't know where you mean.

Q. This writing here where it says, "Pay to said lessor"—

A. Let me look at that just a minute please.

Q. Yes, sir. (Hands witness paper.) Plaintiff's Exhibit No. 3.

A. There is two figures here I never wrote.

Q. What are they?

A. The "75" and this here "H-e-s."

Q. You never wrote that?

A. I will testify I never wrote that, that is not my figures.

Q. You are absolutely positive of that?

A. I am positive that is not my figures.

The witness further testified: "This paper was not on the table the day I made the last copy; as near as I can recollect, I was the first to sign the duplicate; I couldn't tell you whether Mr. or Mrs. Kuzek signed next; I know they did sign it in my presence at that time; she was a witness; I don't know whether she waited until after he signed it or not; I couldn't say whether she signed as a witness or not; I know she put her name down; I signed it as I made it out and handed it over to him to examine; he didn't read it aloud; I don't know if he exam-

(Testimony of William Elliott.)

ined it; Mrs. Kuzek did not read it aloud; it is not a fact that I held one paper in my hand and Mr. Kuzek held another and Mrs. Kuzek held the pencil memorandum in her hand at that time."

Q. Is that original draft in the same words as the original was in or not?

A. I could not tell you that; I didn't pay any attention to that one at all, when I wrote it up I started it lead pencil and threw it to one side.

Q. Was the duplicate in the same words that the original was in except the word "75," the figures "75"?

A. Well, I could not say that hardly; there might be a difference; it was a mistake in putting down 75 per cent to the lessor, I always thought so.

Q. What do you mean by putting down?

A. I mean putting it down to him, to Mr. Kuzek, instead of 25.

Q. Everything else is exactly the same, to the best of your recollection?

A. Let me look at that again.

Q. I am asking for your independent recollection. I am asking whether or not he recollects at this time that the duplicate was an exact copy of the original, save and except the figures "75"?

A. As near as I can recollect, it is, excepting the line that I called your attention to a few minutes ago.

Q. Did you know at the time that it was incorrectly drawn in the duplicate?

(Testimony of William Elliott.)

Mr. ORTON.—Objected to, the witness has never stated that it was incorrectly drawn, he says the word was not written on the same paper.

Q. Is that what you intended to say?

A. Yes, sir.

Q. Then the words are the same and the only difference then is in the dropping of the word one line, is that correct?

A. One or two, or one and a half, possibly, I don't know just what, and 75 instead of 25.

Q. With that exception, in your opinion, it is an exact copy?

A. As far as I can recollect, it is, and still there may be a word there that was not written at all.

Q. It was your intention to make an exact copy, was it not?

A. Of the original, yes, sir, what I claim to be the original, the first one I drew up.

Q. I want to ask you again, although you have already answered, did you or did you not use the original at the time you made this duplicate?

A. I used the original, I took it there to their house for that purpose, but in regards to reading it or using it, I can't swear I did, I thought I was familiar with it.

Q. You don't know whether it was used at all.

A. I may have referred to it, I might have, although I knew the dates.

Q. I am asking you the question, whether or not you used the original to your best recollection?

(Testimony of William Elliott.)

A. I tell you the original laid there for that purpose.

Q. That is not an answer to my question.

A. I don't know whether I used it or not.

Q. What is your best recollection about it?

A. That is it.

Q. Your best recollection then is that you did or did not? A. I am not positive.

Q. Which way do you think it was?

A. I am not positive, to the best of my recollection I don't know which way it was, whether I used it or not.

Q. You may or may not? A. Yes.

Q. You were asked for a duplicate?

A. Yes, sir.

Q. You drew this up for them to sign as a duplicate?

A. I did.

Q. You didn't care whether it was an exact copy or not? A. I certainly did.

Q. You didn't compare it with the original?

A. I made a thousand mistakes in my time where I suffered afterwards.

Q. Did you do it?

A. I can't say as to that.

Q. Then you might have compared it; then it might have been compared?

A. It might or might not, that is, in comparing the two I might have used it or might not.

The witness further testified: "Mr. and Mrs. Kuzek did not compare it; I made out their copy and threw it over to them; they certainly picked theirs up; it's im-

(Testimony of William Elliott.)

possible that Mr. Kuzek took up the duplicate and read it and then passed it over to Mrs. Kuzek and then Mr. Kuzek took the original and read it out loud; I would certainly have heard it, if they had done so; I left the duplicate with them and put the original in my pocket and took it over to my house."

Counsel here offered in evidence the pencil draft made on the same day the original was executed. It was admitted in evidence and marked "Plaintiff's Exhibit No. 3," and upon request of counsel for defendants, the Court directed the clerk to have it photographed.

Q. Will you be kind enough to read aloud the words that are written by you in that draft?

A. "Charles Magaha and William Elliott, Nome," and "Y" to this party, "Magaha and Elliott, November A. D." and figure "3," "15" and "Mo," and "8 men," this "2," "the year ending June the 5, 1904, also give them the right to sluice what pay dirt they have in dumps until finished," I am not sure about that "right," I could swear to that, almost, I couldn't say as to that; "then to sluice what pay-dirt they have in dumps until finished," and "His"; that is all; I couldn't state who wrote the words written in ink; that was on the paper before I saw it; when we came to draw up the written agreement, Kuzey said, "I have started one in December, or the 5th of December, we can draw from this; nothing was said about getting an attorney; Mr. Kuzek did not ask to come up town to get an attorney; when I was drawing up the

(Testimony of William Elliott.)

original, I used that draft in the start as a form to go by, as to how we should draw it; neither one knew how to draw it; I used that paper to start the original, to kind of have an idea how this ought to be drawn up; there were present only Magaha, myself and Mr. and Mrs. Kuzek; I could not say who signed first; I couldn't say whether the original instrument was read over at that time; there was some reading done before it was all wrote; I couldn't recollect whether it was read over two or three times or not; I know about what took place, I am satisfied in my own mind that it was not read over. I know that it was handed around to see if it was all right, I had to take it to town and get there by 2 o'clock, and it was after 2 o'clock, or close to 2 o'clock, before I started; Mr. Kuzek did not ask for a duplicate; I told him I will make another one out to-morrow when I come down," he says all right; on April the 4th he seemed to be pretty insistent to get the duplicate; on that night right after supper he wanted it signed; I told him I would fix it up to-morrow; that I preferred to fix it the next day; and he said he wanted it right then; and I said "all right, I will do the best I can at it."

A paper was here handed to the witness, marked Plaintiff's Exhibit No. 2, and he testified concerning it that he wrote all of the written part of said exhibit except the three signatures, Bertha Kuzek, Stanley Kuzek and Charles F. Magaha.

Q. It says here "To pay to said lessor or his legal representatives or assigns 75 per cent"?

(Testimony of William Elliott.)

A. I see that.

Q. It says to pay to "his" legal representatives or assigns 75? A. I see.

Q. You understand the meaning of the word "lessor"?

A. I don't know as I may have then, I certainly know it now.

Q. Did you at that time?

A. I think I did, yes.

Q. You have been a mining man?

A. I have been a mining man around where they never use anything of that kind.

Q. You didn't have to have occasion to use it to know what that means? A. I know what it means.

Q. You knew what it meant at the time, did you?

A. I did, yes, sir.

Q. And when you put in the 75 per cent in there, you knew that you were giving it to the lessor, didn't you?

A. Seventy-five; that was my mistake.

Q. You knew that you were giving it to the lessor?

A. I didn't know I was giving him 75 per cent.

Q. You were giving to the lessor or "his" not "their" legal representatives? A. I understand that.

Q. You didn't know that you were giving the lessor 75 per cent?

A. I might have been thinking of something else when I was writing.

Q. You might have been careless?

A. I might have been so.

(Testimony of William Elliott.)

Q. You think you were careless, don't you, when you wrote that? A. I know I was.

Q. You know you was?

Redirect Examination by Mr. ORTON.

Plaintiff's Exhibit No. 3, being shown to the witness, he testified as follows: When I first saw this paper this ink writing was written on it. Mr. Kuzek produced it. After Mr. Kuzek produced this paper I done no writing here (indicating). I wrote: "Charles F. Magaha and William Elliott, of Nome"; I wrote the "y" here to party, then "Magaha and Elliott." The figures "1903" just before the word "year" is not my writing. That figure "4" I would not swear to that, but I think it is my writing. Coming to paragraph "First" where it reads in printing, "First," etc., I don't think I wrote the word "November," I wouldn't say for sure. It isn't my "N." I wrote the word "15." The words "most 8" looks like mine. The word "her" just before "legal representatives" is not mine, I never make an "h" like that. I did not write the word just before the word "legal," nor the figures "75" after the word "assigns."

Q. After the word "during," the balance of the pencil writing before the words "and that the lessor" did you write that? A. I did; yes, sir.

Q. The word "his" before "legal representatives" in the last line of paragraph IV, did you write that?

A. It is mine, that is my writing, I always make an "h" like that, in all my writing, I always write it that

(Testimony of William Elliott.)

way; I never start at the bottom, you never find any word wherever I use "h" in it where I got it in the other way, I never start it that way unless there are two words together where I would have to run up.

Q. Now, I will ask you to state, Mr. Elliott, whether or not the word "h-e-s" or "h-e-r," or whatever that is before—in the fourth paragraph of this socalled draft of the lease, Plaintiff's Exhibit No. 3, the word in pencil writing, immediately before the words "legal representatives or assigns" was written on the paper that day? A. It was not written in my presence.

Q. Was the word or figures "75" after the word "assigns" in the same paragraph written that day?

A. They were not placed on that by me, and I never saw them there.

Recross-Examination by Mr. BRUNER.

Q. Since this morning, you have changed your mind in regard to what words you wrote in this, haven't you, Mr. Elliott?

A. After looking it carefully over there I say I never wrote that (pointing). I have changed my mind to say that it is not my writing.

Q. This morning you testified that you wrote all the pencil writing here, excepting the words "his" and "75," didn't you?

A. I don't think I said anything about "1903" there.

Q. Did you say you wrote that "1903" where it reads, "for the period of 1903, year from date"?

(Testimony of William Elliott.)

A. I didn't write that; no.

Q. Did you write the word "4" in 1904 before "unless sooner terminated"?

A. I couldn't swear to that, but I don't think I did, my figures have all got a different slant from that.

Q. Please write the figure "1903."

(Witness handed paper and pencil.)

Q. Please write your name.

A. Write my name?

Q. Please write "his." A. H-i-s.

Q. Now write "175." A. 175.

Q. Now, write "1903." (Witness writes as requested.)

The COURT.—If it suits your purpose, will you just run the pencil around it.

Q. I have had him write his name, so there will be no question about it; just run the pencil around it.

A. That way?

Mr. A. J. BRUNER.—We ask that this be introduced in evidence. Have you any objections?

Mr. ORTON.—None whatever.

The COURT.—It is admitted.

(Marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. ORTON.) Have you seen this paper which is identified as Plaintiff's Exhibit No. 3 since you left court this morning? A. No, sir; I have not.

CHARLES F. MAGAHA, called on behalf of defendants. The witness was handed Plaintiff's Exhibit No. 2, the duplicate, when he was asked the following questions:

Q. I call your attention to paragraph marked 4, which reads: "To pay to the said lessor his legal representatives or assigns 75 per cent of the gross output of said claim," etc., and I ask you to state if you can, what was the wording of the original lease in that paragraph.

Mr. BRUNER.—Objected to the question as irrelevant, immaterial and incompetent, and not the best evidence.

The COURT.—The objection overruled.

A. Well, to my best remembrance, it read, 25 per cent to the owner, and 75 per cent to Mr. Elliott and myself. I can't say whether the words "75" in the original lease was in writing or figures or both, but the figures were there, 25; but I couldn't swear that the writing and figures both were there; I signed the duplicate in the morning at the breakfast table at Mr. Kuzek's residence on Marion Bench; Elliott; Mrs. Kuzek and Kuzek had already signed it; I think Mr. and Mrs. Kuzek were both there at the time.

Cross-examination.

When I signed the duplicate, there was only one paper present at the time; I didn't read it over; they shoved it up to me and I signed it; Billy told me in

(Testimony of Charles F. Magaha.)

the morning that it was all right; all I had got to do was to sign it, it was made out the night before.

Q. You relied entirely upon the statements of your partner as to the terms of this lease.

A. I did, if I hadn't I should have read it over, but I didn't read it over.

Q. There were no representations to you by Mr. and Mrs. Kuzek in regard as to whether it was a true copy or not?

Mr. ORTON.—Objected to as immaterial, irrelevant and incompetent.

Mr. A. J. BRUNER.—We are trying to find out what took place.

The COURT.—Objection overruled.

A. No, sir. I am positive that I didn't read the paper over at all before signing it; I made no comparison between the duplicate and the original; the original was not there at the time; nor was the pencil copy there; I did not read the duplicate aloud, nor did Mr. or Mrs. Kuzek read the paper aloud, at that time; there was no comparison made between that paper and the pencil memorandum; I am almost positive I signed the duplicate at the breakfast table, and not in the sleeping-room adjoining it; I did not have the original paper in their house at that time; I made no comparison whatever, nor did Mr. or Mrs. Kuzek in my presence at that time read the copy to me or make any comparison between the duplicate and the original or

(Testimony of D. M. Taylor.)

the pencil copy. I could not say whether I used the same pen and ink as the others.

D. M. TAYLOR, a witness on behalf of the defendants, testified as follows:

I reside in Nome; I have known Mr. Elliott since the latter part of February, 1904; I first met Mr. Magaha and Kuzek on the 3d day of March; I was on the Marion Bench Claim, first on the 3d day of March; some time in the afternoon of the 4th of March, Mr. Elliott showed me a document that purported to be a lease of this claim.

Q. I will ask you to examine this paper and state whether or not the document which Elliott showed you, which purported to be a lease of these premises resembled that paper in appearance?

Mr. BRUNER.—Objected to for the reason that it is immaterial, incompetent, irrelevant, and not the best evidence.

The COURT.—Objection overruled.

A. Yes, something similar to that one on a blank form of lease. I examined the paper Mr. Elliott showed me very carefully; I read it over, the parties to the paper were Mr. Elliott and Magaha, as lessees, and Mr. Kuzek as lessor. Mrs. Kuzek's name was signed as a witness.

Q. I will call your attention to what is denominated as paragraph fourth in this one, and I will ask you to

(Testimony of D. M. Taylor.)

state what royalty this lease provided, if any, which was to be paid to the lessor?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent and not the best evidence.

The COURT.—Objection overruled.

A. It provided a royalty of 25 per cent; I was acting then as manager for the Beau Mercantile Company, engaged in the business of general merchandise.

(Mr. Bruner moved to strike out the evidence of the witness, on the ground that it is immaterial, irrelevant and incompetent and not the best evidence.)

The COURT.—Objection overruled.

FRED STREHLKE, a witness produced in behalf of the defendants, testified as follows:

I have known Elliott and Magaha and Kuzek since the latter part of February; I know the Marion Bench claim; about the first part of April at Magaha's cabin, on Peluk creek, Mr. Elliott showed me a document purporting to be a lease on the Marion Bench claim; I read the paper at that time; I do not remember the date of it; I don't know by whom it was signed; I never paid much attention to it; several names were signed but I only noticed one, Mr. Elliott's; there was a name signed as a witness, but I didn't notice who it was; it referred to the Marion Bench claim; it provided for the payment of 25 per cent royalty to the lessor; I read the lease over.

C. G. COWDEN, a witness produced on behalf of defendants, testified as follows:

I am cashier of the Alaska Banking and Safe Deposit Company, and reside at Nome; I have known Magaha and Elliott and Kuzek in the neighborhood of a year; I know where the Marion Bench Claim is, and have been on the ground myself. I remember the occasion about March of this year of being called on by Mr. Elliott and Mr. Taylor, and of the Beau Mercantile Company, and their showing me a paper concerning this claim; the paper was a lease of the Marion Bench claim, signed by Mr. Magaha, and Mr. Elliott and Mr. Kuzek; I don't remember if it was signed by any witness; I read the paper carefully as I would where it was a matter of importance that I should know what the paper contained; it provided a percentage to the owner of the claim; as I interpreted it, it was 25 per cent.

Q. State whether or not you had any particular reason at that time for examining it carefully?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent, not proper direct examination.

The COURT.—The objection overruled.

A. I did.

Q. What was the purpose or reason?

Mr. BRUNER.—The same objection.

The COURT.—The objection overruled.

(Testimony of C. G. Cowden.)

A. I examined the lease with reference to making a loan on the lay of Mr. Elliott and Magaha.

Q. Did you make that loan at that time?

Mr. BRUNER.—Objected to for the same reason as last.

The COURT.—The objection overruled.

A. I did; it amounted in the neighborhood of $1,900, or $2,000, in all advanced. I believe Mr. Elliott, Mr. Magaha and Mr. Taylor were all present at the time in the bank, the first time I examined the lay; I saw the lease a second time, but made no especial examination of it then; am not sure that I read it over then.

Cross-examination.

By Mr. A. J. BRUNER.—What I have stated is merely to the best of my recollection, after an examination; I am not willing to positively swear that the words were so and so.

D. M. TAYLOR, recalled, a witness produced on the part of the defendants, testified as follows:

On the 3d of March, last, I was on the Marion Bench Claim when there were present Mr. Elliott, Mr. Magaha, Mr. Kuzek, and a number of others, that I was not acquainted with; I held a general conversation with Mr. Kuzek and the others in his presence in relation to the lease on the premises between himself and Magaha and Elliott; the parties who took part in the conversation

(Testimony of D. M. Taylor.)

were Mr. Elliott, myself and Mr. Kuzek, if I remember rightly, the three of us.

Q. State whether this conversation related in any way to the amount of royalty to be paid to the lessor.

Mr. BRUNER.—I object to the question if it has reference to the matter which is now before the Court on the ground that it is immaterial, irrelevant and incompetent; second, that it is not the best evidence, and third, that it is inadmissible to contradict the terms of a written contract by any evidence of any contemporaneous or antecedent conversation between the parties.

The COURT.—This is a conversation prior to April 4th?

Mr. BRUNER.—Prior to the making the original in March.

Mr. ORTON.—I want to state in a general way what we offer to prove by this witness, so your Honor will be able to tell intelligently what is before the Court, I wish to prove at this time— I have several classes of admissions I wish to offer—in this particular case it is the statement of Mr. Kuzek which he made immediately prior and on the very same day of the drawing up of the original lease as to the terms of the oral lease under which they had been operating already, for almost three months; that that conversation took place immediately before the original was drawn, and within a few hours; that Mr. Taylor went down there for the

(Testimony of D. M. Taylor.)

very purpose of finding out what the terms of the lease were; and that he went to Mr. Kuzek and asked him, and then Mr. Kuzek told him and that Mr. Kuzek said we will draw the paper up right away. I want to state that I don't offer this evidence for the purpose of attempting to contradict or vary in any way the terms of the original agreement which was entered into between Magaha, Elliott and Kuzek, but to show what that contract was.

The COURT.—We will overrule the objection.

A. It did.

Q. State the conversation had in the presence and with Mr. Kuzek?

Mr. BRUNER.—This is all under objection as irrelevant, immaterial and incompetent; not the best evidence and improper, and attempting to vary the contents of a written instrument by parol evidence of a prior conversation.

The COURT.—I understand that; the objection is overruled.

A. He stated they didn't have any lease, and he said, "Here is Mr. Kuzek; he can tell you what it is and so can I"; he says, "We are to receive 75 per cent of everything we take out up to the 5th day of June, with the privilege of washing our dumps up any time after"; he says, "Isn't that right, Kuzek?" To which Mr. Kuzek replied, "Yes." He says, "You can take your papers up with you; we can make them out, and it won't take

(Testimony of D. M. Taylor.)

us ten minutes to sign them—you can take them up as you go"; that was the sum and substance of the conversation.

(Mr. Bruner moved to strike the answer out on the same grounds last stated, which motion the Court overruled.)

Q. How long in time was that, prior to Mr. Elliott's bringing you the lease.

A. That was the day before—the afternoon of the day before.

(Mr. Bruner moved to strike out the testimony relating to the conversation on the ground that when the offer of the testimony was made, counsel stated that it was the same day and but a few hours before the signing the lease; which motion was overruled by the Court.)

Q. They brought the lease to me the next day in the afternoon; I have lived in Nome and vicinity since the spring of '99; have been mining in Nome District, and various places; part of the time on claims of my own and part the time on claims of others.

Q. What character of mining have you done, with reference to mining yourself or under lease or leases?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent; which objection was overruled by the Court.)

A. Both. I mined property interested in myself, also on leases; I am working on a lay at the present time.

(Testimony of D. M. Taylor.)

Q. State whether or not you are familiar with the character and conditions of the country in the neighborhood of Nome with reference to its deposits of gold-bearing gravel and the character and nature and extent of it?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent, which objection was overruled by the Court.)

A. Yes; I have been somewhat acquainted with Peluk creek for the last year; I visited almost every mine from here to Hastings.

Q. Are you familiar with the amount of royalty which is usually paid or reserved by the lessor and lessee upon claims of the character and description as found on the Marion Bench Claim? A. I am.

Q. I will ask you if you are acquainted with the range of percentage which was paid to the lessor upon ground of the character and description of the Marion Bench Claim during the past year or two years?

A. Yes, sir.

Q. I will ask you to state what that percentage is or was during that period.

(To each of the foregoing questions, Mr. Bruner made the objection that they were immaterial, irrelevant, incompetent and not included within the issues, which objections were severally overruled by the Court.)

A. Twenty-five per cent was paid to the lessor, I could not say; I know of a great number.

Q. I will ask you to state what is the highest per-

(Testimony of D. M. Taylor.)

centage you have ever known to be paid on ground of a similar nature to that of the Marion Bench Claim?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent, and not within the issues in this case, and the witness has not shown that he is a competent judge of this matter; which objection was overruled by the Court.)

A. The highest percentage I know to have been paid on ground similar to this along the beach line is 25 per cent to the lessor.

(Mr. Bruner moved to strike out all the evidence of the witness with regard to the amount of the percentage in other lays or leases that had been made on Peluk creek, upon the ground that the testimony is immaterial, irrelevant and incompetent, and the witness is not shown to be competent to testify upon this matter, and that it is not included within the issues of this case; which motion was overruled by the Court.)

C. G. COWDEN, recalled for the defendants, testified as follows:

I was down at Peluk creek on the 8th of March; since June, 1901. I have been engaged in the business of banking and also been engaged in the business of mining.

Q. Have you with reference to whether you mined your own property or worked lays or let lays? State what your experience has been?

(Testimony of C. G. Cowden.)

Mr. BRUNER.—Objected to on the ground that it is shown that he is a banker, and if he has entered into mining speculations it does not make him competent to testify.

Mr. ORTON.—I expect to show that he has examined many mines for the purpose of loaning money on them.

The COURT.—The objection overruled.

A. I have been interested in property upon which we have let lays and I have worked property myself.

Mr. BRUNER.—It will be considered that all this character of testimony is under objection.

The COURT.—And all overruled.

Q. I will ask you whether or not you have had occasion since your stay in Nome to examine mines with reference to forming a judgment as to values?

A. I have.

Q. Did you make an examination of the Marion Bench Claim? A. I did.

Q. I will ask you if you are familiar with the mining claims on Peluk creek, and in the neighborhood, with reference to their kind and character and the nature of the gravel deposits?

A. I have examined a number of mines in that vicinity and know something of them.

Q. I will ask you if you are familiar with the usual rate of royalty that is paid upon mines at and near Peluk creek of the same kind and character as the claim in dispute? A. I am.

(Testimony of C. G. Cowden.)

Q. What is that rate?

A. Usually 25 per cent to the owner; however, it varies.

Q. What is the range?

(Mr. Bruner made the further objection that it called for the opinion of the witness; which objection was overruled by the Court.)

A. Thirty-five cents to the owner is the best that I have known on that character of ground in that vicinity.

Cross-examination.

I never had any experience in mining before I came to Alaska; I never worked in a mine, and never had charge of a mine as a foreman.

G. W. MARSH, a witness produced on behalf of the defendants, testified as follows:

I have lived in Nome since 1901; am acquainted with Marion Bench Claim, and have known Mr. and Mrs. Kuzek for some time; I became acquainted with Magaha and Elliott about the first of January; I have a lay on Mr. Snyder's ground near Peluk creek; it joins the Marion Bench Claim west of it.

Q. State whether or not you ever had any conversation with Mr. Kuzek in relation to the terms of the lay between himself and Magaha?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent; which objection was overruled by the Court.)

(Testimony of G. W. Marsh.)

A. I had several conversations with him in January.

Mr. BRUNER.—We ask that all questions be ruled out in regard to any conversation had prior to the time of signing the instruments, as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

A. The first conversation was held with Mr. and Mrs. Kuzek at my dump on the Snyder claim; I know it was in the month of January; the terms of the lay between Kuzek and Elliott and Magaha as to the amount of the royalty to be paid to the lessor was spoken of.

Q. State what was said by Mr. Kuzek on that subject at that time?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, if it is for the purpose of contradicting the terms of any agreements which were reduced to writing in the month of March by the parties.

The COURT.—Objection overruled.

A. He was talking there as to what kind of a lay we had there and asked what kind of a lay I had, and I said I had a very good lay; I didn't tell him what I had, but I said I had a very good lay; he said, "I am giving our boys 75 per cent, and I hope they will pull through"; that was before they struck the good ground, somewhere about the first of February. He said the boys were working very hard and had taken out a lot of dirt; the next conversation I had with him was some time in February at my dump; he spoke about the boys had struck it pretty good down there and was glad they had got it, and would pull through all right.

(Testimony of G. W. Marsh.)

(Mr. Bruner moved to strike out the last answers, as immaterial, irrelevant and incompetent.)

The COURT.—We will let it stand in.

The only time there was anything said about the percentage of royalty was on the occasion of the conversation in January; I have lived on Peluk creek since some time in November; since coming to Nome my business has been mining all together.

Q. I will ask you whether or not you are familiar with the mining claim situate on Peluk creek, and on the bench in the immediate vicinity with reference to the kind and character of gravel and deposits and the amount of gold contained there?

(Mr. Bruner objected to the question as being irrelevant, immaterial and incompetent; which objection was overruled by the Court.)

A. Yes, sir.

Q. Are you acquainted with the amount usually paid on claims situated in that vicinity on the creek and beach on similar claims, with the amount of royalty usually paid to the lessor, in case of leases during the past year?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid for the question. Which objection was overruled by the Court.

A. Yes, sir.

Q. What is that percentage?

A. It runs from 75 per cent to the lessor.

(Testimony of G. W. Marsh.)

Q. (The COURT.) The laymen, you mean?

A. Yes, 70 per cent is the least, to my knowledge. Magaha and Elliott first commenced to work the Marion Bench Claim sometime in December; at that time the claim had been mined some.

Q. Did you ever have any conversation with Mr. Kuzek as to the kind of ground the Marion Bench Claim was or the amount of pay it contained.

A. Yes, sir; about the 1st of December of 1893.

Q. I will ask you to state what that conversation was?

(Mr. Bruner objected to the question as irrelevant, immaterial and incompetent and prior to the entering into the contract by the defendants and that there is no proper foundation laid.)

Mr. ORTON.—It was immediately prior or just at this time.

The COURT.—Objection overruled.

A. It was about the 1st of December, just before Magaha and Elliott went to work, I asked him how things was; he was prospecting, he had a hole sunk down; he said he was getting dirt running about a cent —two cents; I said, "That is pretty low grade for thawing." He said, "yes; it might be better."

Q. Do you know how soon after that the pay was struck on the Marion Bench Claim?

(Mr. Bruner objected as immaterial, irrelevant and incompetent.)

(Testimony of G. W. Marsh.)

The COURT.—Objection overruled.

A. I don't know exactly, but I think it was some time in February.

Q. By whom was it struck?

(Mr. Bruner objected to the question as immaterial, irrelevant and incompetent.)

The COURT.—Objection overruled.

A. Struck by Magaha and Elliott.

Cross-examination.

When Mr. Kuzek was working he was working south from where Magaha and Elliott were working, it may have been 200 feet; I was working north of Kuzek's ground; I don't know much about the workings on the Kuzek ground.

WILLIAM SNYDER, called as a witness on behalf of the defendants, testified as follows:

I have been engaged in the business of mining in and about Nome since 1900; am acquainted with the Marion Bench Claim and own the adjoining claim to it; I know Mr. Kuzek, Mr. Magaha and Mr. Elliott; am pretty well acquainted with the mining ground on Peluk creek and vicinity, and have mined there myself; about the middle of March, 1904, I had a conversation with Mr. Kuzek with reference to the amount of royalty which he was to receive from Magaha and Elliott on the lease of the Marion Bench Claim.

Q. State what that conversation was, with reference to the amount of royalty which Kuzek was to receive.

(Testimony of William Snyder.)

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

(Which objection was overruled by the Court.)

A. One day going across the tundra, Mr. Kuzek and I met and we compared notes regarding lays; I asked him the conditions—under what conditions he had let his lay with his laymen, and he stated to me that he had given out a one year's lay to expire June 4th, I believe, at 25 per cent to himself and 75 per cent to the laymen. I remarked to him that in one sense of the word he had the best of me, as I had let my lay out for two years, but I was getting a better percentage than he was, as I was getting 30; I am to a certain extent familiar with ground on Peluk creek and vicinity with reference to the kind and character of gravel, and the amount of gold contained in it; I mined there myself and worked with my laymen; I know something about the amount of royalty which is usually paid on claims in that vicinity of this character.

Q. What is the amount of royalty usually paid to claim owners.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

(Which objection was overruled by the Court.)

A. On an average from 25 to 30 per cent to the owner.

THOMAS BARKER, a witness produced on behalf of the defendants, testified as follows:

My business is mining; sometime in the forepart of April I met Mr. Kuzek for the first time; I had a conversation with him then in reference to a lease on Marion Bench Claim as to the amount of royalty he was to receive.

Q. State what that conversation was.

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent and not within the issues of this case.

The COURT.—Objection overruled.

A. We was talking about panning in the mine; he was panning on bedrock, and he said to look at the prospect; and I says, "Is that a prospect from the pay-streak"; and he says, "No"; he says, "It is off bedrock which they left." I says, "The boys have got a pretty good thing here"; he says, "Yes, they have got a good thing." I thought I knew where to hit him, and I says to him, "What are you giving them?" and he says, "I am giving them 75 per cent and they want to run over it"; he says, "they are leaving too much of the bedrock." We held the conversation in the boiler-room; it was very short; I never met him before or since.

J. E. BARKER, a witness produced on behalf of the defendants, testified as follows:

I am acquainted with Mr. Kuzek, Magaha and Elliott, and with the Marion Bench Claim; about the middle of March I had a conversation with Mr. Kuzek in reference

(Testimony of J. E. Barker.)

to the amount of royalty he was to receive from Magaha and Elliott, on the Marion Bench Claim; it was held in the drift.

Q. State that part of the conversation with reference to the amount of royalty that he was to receive.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent, and an attempt to contradict the terms of the agreement which was afterwards reduced to writing.

The COURT.—Objection overruled.

A. I was going into the drift and he was coming out with a pan of bedrock that he had panned in the hole; he showed it to me—the prospect. He says, "That is pretty good for being on the bedrock." I says, "Yes, sir," but I says, "It is pretty hard to get it all, and we are going into bedrock pretty deep in some places." He says, "Yes, but they are not careful enough; they are getting a pretty good thing and I think they ought to be careful." I says, "How much are they getting," and he says, "75 per cent." I says, "That is pretty good." I never had any other conversation with him about the same matter.

THOMAS JACOBS, a witness produced on behalf of the defendants testified as follows:

I know Kuzek, and Elliott and Magaha and the Marion Bench Claim. I had two or three conversations with Mr. Kuzek in relation to the amount of royalty he was to

(Testimony of Thomas Jacobs.)

receive from Magaha and Elliott under the lease on the Marion Bench Claim. The first conversation was some time in the latter part of February, in Kuzek's cabin on the Marion Claim.

Q. What did Mr. Kuzek say at that time with reference to the amount of royalty that he was to receive?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent and on the ground that it was before the contract was reduced to writing.

The COURT.—Objection overruled.

A. He told me he was getting 25 per cent himself, and 75 per cent to Magaha and Elliott; the next conversation was about the middle of March, in his cabin on Peluk creek, Mrs. Kuzek also being present.

Q. State with reference to this matter as to the amount of royalty.

Mr. BRUNER.—Objected to the question as immaterial, irrelevant and incompetent.

The COURT.—The objection overruled.

A. The same amount of royalty; he said he was giving the boys 75 per cent and that he was getting 25. I have resided in Nome since the spring of '99, and have been mining most of the time, to a certain extent—I worked there a part of the time this winter—and am acquainted with claims on Peluk creek and its benches or claims in that vicinity with reference to the kind and character and kind of gravel and amount of gold therein. I am acquainted with the amount of royalty which

(Testimony of Thomas Jacobs.)

is usually paid to owners upon claims situated upon Peluk creek and vicinity.

Q. What is that now?

Mr. BRUNER.—Objected to on the grounds as heretofore stated.

The COURT.—The objection is overruled.

A. Twenty-five per cent; I have heard of cases where 30 per cent was paid to the owner.

Cross-examination.

I first went out on this claim in the latter part of February; had been out there before looking over the country. I didn't have any particular knowledge of the mines in that particular section. I had been down there two years ago when they struck pay, on the claim adjoining this mine, and I was trying to get a lay there on this ground myself, if I could; that's the only knowledge that I had prior to this winter in regard to Peluk creek; I know some parties who took a lay further down on the same pay-streak; they was getting 75 per cent for working the ground. I don't know what the Homer Bench Claim was leased for; I haven't gone through the mines and examined them. I worked on the Marion Bench Claim on the boiler most of the time; I worked all over the mine.

Redirect Examination.

Q. Did you ever have any conversation with Mr. Kuzek as to the amount of money his share, his royalty, would be.

(Testimony of Thomas Jacobs.)

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled.

A. Yes, sir; about the middle of March in Kuzek's cabin, Mrs Kuzek being present, he said Charley told him that they would take $25,000 out and that his share would be $6,000, and possibly it might run up as high as $7,000 before they got through.

Q. How did you happen to have this conversation with Mr. Kuzek?

Mr. BRUNER.—I object to that question as being irrelevant, immaterial and incompetent.

The COURT.—Overruled.

A. I went there to get a lay on a fraction he had there. He said that he would not give a lay on the fraction; that he wanted to sell the claim and the fraction, and everything that he had. I asked him his price and terms and he told me for $23,000 he would sell the fraction and the claim and the building and the house and everything that he had there and his share in the dumps. I asked him his terms and he said he wanted $3,000 cash down, and to take his share out of the dumps and security on the claim for the money and wanted it all paid in July. I asked what his share would be in the dump and he says, "Charley told me they surely would take out $25,000 this winter, the way the dirt runs now; my share will probably be $6,000." He thought it might be as high as $7,000.

(Testimony of Thomas Jacobs.)

(Mr. Bruner moved to strike out the answer on the ground before stated.)

The COURT.—The motion overruled.

Recross-examination.

I should say it is one of the best claims I know of where they struck the pay there. There is a good spot there. If I owned that claim, and knew how to work it myself, and had the pay located as good as they have it there, I would not let it out for 25 per cent. When I went to work on the 23d of March I would not have rented the property for 25 per cent.

JOHN MAY, a witness produced on behalf of the defendants, testified as follows:

I have met Mr. Kuzek twice, both occasions being in April last; I met him on the trail between his claim and Nome; I had been out to his claim and residence.

Q. What did you go there for?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. To see Mr. Kuzek in regard to purchasing his claim. I had a conversation with him in relation to the Marion Bench Claim, N. V. Johnson being with me.

Q. State the substance of that part of the conversation wherein he stated the amount of royalty he would receive from the laymen, Magaha and Elliott?

(Testimony of John May.)

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. I met him and told him I understood his property was for sale at a given amount and I asked him if the royalty he received would be applied on the purchase price, and he said it would, and I asked him the amount and he said 25 per cent. This was about the 20th of April.

N. V. JOHNSON, a witness produced on behalf of the defendants, testified as follows:

I do not know Mr. Kuzek, but met him once on the trail between here and Peluk creek in company with Mr. John M. May. I had been on the Marion Bench Claim on that day.

Q. How did you happen to go down there—just generally?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. I was employed to go down there for the purpose of investigating the Marion Bench Claim, and did examine it to a certain extent. Mr. May had a conversation in my presence with Mr. Kuzek on the trail; some conversation was had about the amount of royalty which he was to receive from the laymen, Elliott and Magaha.

Q. Just state that part of the conversation wherein

(Testimony of N. V. Johnson.)

he mentioned the amount of royalty with enough of the balance of the conversation to make it intelligible.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. We met Mr. Kuzek on the trail, and Mr. May asked him if his name was Kuzek—neither of us knew him—and he said it was. I can identify the man now; I have seen him once or twice since. Mr. May told him that he understood that his ground was for sale, and Kuzek said it was. Mr. May asked him in regard to the lay, and he said it expired some time about the first of June. He asked him what royalty he was to receive therefrom and he said 25 per cent. Nothing further was said in the conversation about royalty. I have been a miner for 22 years, and have lived in the Nome District ever since 1900.

Cross-examination.

In the conversation between Mr. Johnson and Mr. Kuzek, Mr. May asked the question whether 25 per cent went to the lessor, and Kuzek said "Yes, sir."

CHARLES MARSH, a witness produced on the part of the defendants, testified as follows:

I have known Mr. Kuzek since about February last. I live in Nome and know the Marion Bench Claim. I worked on the Snyder Bench, near Kuzek's mine. Along in the forepart of March, I had a conversation with Mr. Kuzek with relation to the amount of royalty which he

(Testimony of Charles Marsh.)

was to receive from the lay on the Marion Bench Claim; it was held in his cabin, and was the only conversation I ever had with him. Kuzek asked me how much royalty we were receiving, and I told him we were receiving 70 per cent. He says, "I am doing better by the boys; I am giving them 75 per cent." He did not mention Magaha and Elliott's name; he only used the word "boys."

RALPH GEARTNER, a witness produced on the part of the defendants, testified as follows:

I know the Marion Bench Claim and have know Kuzek since the fall of 1900. I had a conversation with him about the amount of royalty he was to receive from the claim this spring, for last winter's work. I had many conversations with him in regard to the claim—laymen, but that conversation was the only one which mentioned the price. It was pretty late this winter or early this spring—the early part of March or the middle of March; it was in his cabin, Mrs. Kuzek being present. He said the boys were getting 75 per cent, and that they had a pretty good thing of it.

Cross-examination.

I have been in Alaska since 1893, and came to Nome in 1900. I have been mining, and seafaring is my business. I have always been very friendly with Mr. and Mrs. Kuzek, and have been at their cabin eight or ten times since Christmas; remember of having a conversation

(Testimony of Ralph Geartner.)

with Mrs. Kuzek in the latter part of May of this year at her cabin. We talked over their troubles between Kuzek and Magaha and Elliott; did not tell her what my testimony in the case would be. I did not state to her at that time and place in her cabin that I was short of money and that if she would give me some money, I would help her out in this case; I do not recollect stating any words to that effect.

JOHN GREVE, a witness produced on behalf of the defendants, testified as follows:

I know Mr. Kuzek, Magaha, Elliott and the Marion Bench Claim. In the latter part of November, 1903, I had a conversation with Kuzek, in which he stated to me how much royalty he was to receive from Magaha and Elliott.

Q. State the conversation.

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose and for the reason that under the testimony of the witness the coversation was held prior to the time the lay was given, which afterwards was reduced to writing.

The COURT.—Objection overruled.

A. Mr. Kuzek told me that he had let the lay out already to Magaha and Elliott for 25 per cent to himself, and 75 per cent to the laymen.

T. M. REED, a witness produced on behalf of the defendants, testified as follows:

I am an attorney, United States Commissioner and Ex-officio Recorder, and know Mr. Kuzek, Mr. Magaha and Mr. Elliott. I remember the occasion of a lay lease on the Marion Bench Claim, signed by Mr. Kuzek, and Magaha and Elliott being brought to my office by Mr. Elliott, Mr. Magaha, Mr. Cowden and Mr. Taylor of the Beau Mercantile Company; they all came in together.

Q. For what purpose did they bring it to you?

Mr. BRUNER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled.

A. Mr. Taylor and Mr. Cowden were going to let Mr. Magaha and Elliott have some money on their dumps—that is, Mr. Taylor for the Beau Mercantile Company—and they desired some security and they came in to have me draw up a chattel mortgage on the dump. I examined the lay paper, and my best remembrance is it provided for a royalty of 25 per cent to the owner of the claim. I drew up the mortgage.

Cross-examination.

I have no positive recollection; I can place the mortgage in my mind now, and it is possible for me to be mistaken in this matter.

FRED STREHLKE, recalled on behalf of the defendants:

Q. Mr. Strelkhe, did you ever have any conversation with Mr. Kuzek, in relation of the amount of royalty he was to receive from Magaha and Elliott from the lease on the Marion Bench Claim?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. Yes, sir; about the 1st of April in the drift; I asked how much royalty the boys were getting and he said 75 per cent.

(Mr. Orton here offered in evidence the mortgage referred to by Judge Reed in his testimony, which was admitted in evidence without objection.)

WILLIAM ELLIOTT, recalled for the defendants:

Q. Mr. Elliott, how many days did you and Mr. Magaha prospect on this claim before you and Mr. Kuzek agreed on the terms of the lay?

Mr. BRUNER.—Objected to as immaterial, irrelevant and incompetent for any purpose, it being prior to the agreement and contract.

The COURT.—Objection overruled.

A. Part of two days. Mr. Kuzek was present at the time; the character of pay we found was on a small order—very little pay; Mr. Kuzek showed us the pay himself; he worked in the shaft and Mr. Magaha did part

(Testimony of William Elliott.)

of the panning and worked on the windlass; we panned eight pans including the black sand during the two days, and Mr. Kuzek weighed the pans and said it was 23 cents; that was all the prospecting we did before we agreed on the terms of the lay; it was thawed or frozen ground, possibly 14 feet deep to the pay; we sunk one shaft 7x3 and 1/2 feet in size, 14 or 15 feet. We agreed upon the terms of the lay in Mr. Kuzek's house. He was to give us 75 per cent. We went to work on the 11th day of December, 1903. We struck pay on the 29th day of January; until pay was struck, besides Magaha and myself only one other man worked; from February on, eight men in all were at work. We took out in the neighborhood of 46,000 buckets, 9 pans to the bucket. I remember the occasion when Mr. Taylor came to our place and the conversation had between myself, Mr. Kr. Taylor and Mr. Taylor in the engine-house just prior to the time when the laywas reduced to writing. Mr. Taylor asked if he could be shown down to examine the ground. I asked Mr. Taylor if he thought the ground would justify him in advancing us some credit on it. That was in Mr. Kuzek's presence, before the contract was reduced to writing, and Mr. Taylor answered "Sure, I think it will."

(To each and every one of the questions embodied in the foregoing testimony, the plaintiff objected that it was immaterial, irrelevant and incompetent, tending to contradict the terms of an agreement afterwards reduced to writing, and not the best evidence; which said objections were severally overruled by the Court.)

(Testimony of William Elliott.)

Mr. Taylor asked when I would be in town, I told him possibly the next day. He told me to bring my lease with me. I told him it wasn't made out yet; that we just had an oral agreement between us. I said, "We get 75 per cent of what comes out of the ground up to June 5th; Kuzek can tell you the same"; and Kuzek says, "That is right; you can get your paper right off and take them up with you." The next day we reduced the agreement to writing. I first discovered that I made an error in the duplicate somewhere between the 20th and 25th of April.

CHARLES F. MAGAHA, recalled for defendants.

Mr. Elliott and I and Mr. Kuzek prospected this claim a day or two before we definitely agreed on the terms of the lay. The ground was frozen and we used Mr. Kuzek's thawer. Before we made a definite oral agreement about the lay, the pay was very low grade, in the neighborhood of two or three cents a pan. *It between* the 18th and 22d when we definitely agreed on the lay. Mr. Kuzek was to receive 25 per cent of the gold to be taken out, and Elliott and myself were to receive 75.

(To the foregoing testimony, and to each and every question embodied therein, the plaintiff objected, on the ground that it was irrelevant, immaterial and incompetent and not the best evidence; which objections were severally overruled by the Court.)

(Testimony of Charles F. Magaha.)

(Mr. Orton offered in evidence photographs of Plaintiff's Exhibits Nos. 2 and 3, which were admitted without objection.)

C. G. COWDEN, recalled for defendants.

I have done all the duties of an employee of a bank from collection clerk to cashier. I was paying teller in the National Bank of Commerce of Tacoma, for about eight years, and have had experience in the examination of signatures, drafts and other papers, with reference to erasures and alterations.

(Witness being handed Plaintiff's Exhibits Nos. 2 and 3, and the photograph which is marked Plaintiff's Exhibit No. 2, stated:) In my opinion the word "his" written in ink in the line where it says "pay to the lessor or his legal representatives or assigns," and the word before "legal representatives and assigns," in the 4th paragraph, written in pencil in exhibit No. 3, are not in the same handwriting. In my opinion the word "his" where it appears in the last line of paragraph 4, written in pencil, and the word "his" at the same place in the ink one, were written by the same hand. In my opinion the word that is written in pencil before the word "legal" is probably "her"; the word "her" written in pencil, looking at it with the naked eye, appears to have been changed. I do not think the words in figures written in ink in exhibit No. 2 and the same figures on exhibit No. 3, written in pencil were written by the same person. In my opinion the figure "5" in exhibit No. 3,

(Testimony of C. G. Cowden.)

and the figure "5" in pencil in paragraph IV, in the same exhibit where it occurs in the word "75," were written by the same person; the figure "7," before the word "volume" where it is written in ink in exhibit No. 3, and the figure "7" in paragraph IV, have the same characteristics and I believe were written by the same hand. In every case where I see a "5" written in this paper, that is, the tails of the "5" have been connected with the "5"; it has an upward tendency; a person who makes a "5," or any figure with a stroke to it that way, usually makes the stroke very much the same. It has a back and upward turn to the tail of the "5"; the shape of the figures are so similar as to lead one to decide that they were written by one man. There is no similarity between the pencil "5," and the ink "5" in exhibit No. 2, and a person making a "5" of that character would not, in my opinion, make a "5" of that character; the entire style is different. Referring to the "7" in paragraph IV in "75," and the figure "7" just before "volume," I would say that the characteristics in making these two "7's" are the same, yet they are not the same. One is made in pencil in one place, and the other in ink, and I would say that the same hand didn't make these two; the same difference exists between the two "7's" just referred to, and the figure "7" immediately before the word "volume," in exhibit No. 2 and the pencil "7" in paragraph IV of exhibit No. 3, they don't have any of the characteristics. In examining the word immediately before "legal" with the glass, in exhibit No. 3, I think there

(Testimony of C. G. Cowden.)

is an erasure. I was going to add to that, however, that the surface of the paper is itself so dirty and ruffled up that it makes it hardly possible to decide that there has been an erasure; still, it has that appearance.

Cross-examination.

Q. (By Mr. BRUNER.) You have a great deal of interest in this case—a great deal of feeling?

A. I have most certainly feeling in the matter.

Mrs. BERTHA KUZEK, called on behalf of the defendants, testified as follows:

Q. I would like to have you look at Exhibit No. 3, and state whether or not you wrote any part of that instrument? A. No, sir I did not.

Defendants thereupon rested.

BERTHA KUZEK, a witness called on behalf of the plaintiff, testified as follows:

I am the wife of Stanley Kuzek, the plaintiff in this action. I am living on the Marion Bench Claim on Peluk creek. I know Mr. Magaha and Mr. Elliott. I remember the occasion of the signing of a lease by my husband, Mr. Magaha and Mr. Elliott, on the 9th day of March of this year. I know that it was the 9th day of March when the four of us made out the original lease and Mr. Kuzek took care of the boiler while Mr. Magaha and Elliott went to town. I know that it is the only

(Testimony of Mrs. Bertha Kuzek.)

afternoon and night that he ever took care of the boiler and night. I went to work for Magaha and Elliott, and got the first meal for them at supper time, on the 3d of March of this year. I told Mr. Elliott that we could not take them on the 1st or 2d because Mr. Kuzek had not fixed the stove so that we could take them. Mr. Elliott brought over some provisions on the afternoon of the 3d, and that was the day I went to work. The original lease was signed on the 9th of March; I have it in a memorandum-book.

Q. Was there any other circumstance by which you can fix that time?

Mr. ORTON.—Objected to as the witness has already stated how she fixed the time.

The COURT.—Objection overruled.

A. It was Wednesday night. I asked Mr. Elliott if he would kindly bring the "Nugget" up. I was a subscriber for the "Nugget"; and Elliott didn't come back and I hadn't asked Magaha to get the paper, so I didn't get it. I recognize the paper marked Plaintiff's Exhibit No. 3. I have seen it since December. Mr. Kuzek wrote, beginning at the top and reading down; "5th day of December, 1903—Stanley Kuzek—Nome—" "Cape Nome—Marion Claim—J. P. Currie—12—July—'99—Aug.—1899—'97—XVI"; that is all that Mr. Kuzek wrote on that paper. Mr. Elliott wrote the rest of it. Mr. Elliott wrote the figures "1903" between the words "of" and "year"; he also wrote

(Testimony of Mrs. Bertha Kuzek.)

the figure "4" where it says "A. D. 190 "; also the figures "15" in paragraph 1st between the words "the" and "day"; also the words, "November, 1903," in paragraph 1st; also the letters "Mo"; also the word "h-e-s." in the 4th paragraph between the words "or" and "legal"; also the figures "75" in paragraph 4th between the words, "assigns" and "per cent." He also wrote the balance of the pencil words in that paragraph. When he wrote it Mr. Elliott, Mr. Magaha, Mr. Kuzek and myself were all in our cabin on the Marion Bench Claim. Mr. Kuzek said we might draw the paper up and Mr. Elliott was there, and said, "We will draw up a copy first," and Mr. Kusek had this drawn, this copy sometime in December, and Mr. Elliott said, "We will find this out first." Mr. Kuzek had attempted to write it and was going to start in and Mr. Elliott said, "I could perhaps write it better than you could." He said that to Mr. Kuzek, so then Mr. Elliott took the paper and sat down and wrote this part which is written in pencil and read it as he wrote it out. He read, "Pay to said lessor or"—"his"—he wrote "his" and read it, "legal representatives or assigns" and wrote the figures "75" and said "75 per cent of the gross output of said claim during"; then he wrote the year "ending"; he wrote "ending" and so on down. He wrote "June" and spelled it as he wrote it out; "the 5, 1904," and so on until it was finished; he concluded to write another one as this was not a good copy, being part in lead pencil and part in pen and ink; it was better to write it fully out in one handwriting with a pen and

(Testimony of Mrs. Bertha Kuzek.)

ink, and I said to Kuzek that Elliott and Kuzek and Magaha better go down and get an attorney or notary public to make out the paper, and Mr. Elliott said that he could make them out just as good as anybody else, so he took the paper and pen and wrote it down following after the one he had there. When he wrote the first original, the first lease that was right on top, this was right under and as he went on down, he followed it up—what he had written. After he got it written, Mr. Kuzek held this paper while Mr. Elliott read the other one—the original, and compared the papers to see if they were all right; then he handed the paper over to Mr. Kuzek to look over and read—he didn't read it—he handed it to me, and I read it over, the original, and Mr. Kuzek held the other one—the pencil one in his hand, and I read it aloud, and he compared it as I read. Then I handed it back to Mr. Kuzek, and Mr. Kuzek signed, then Mr. Magaha signed, then Mr. Elliott signed and I signed as a witness; then Mr. Kuzek wanted him to draw up another paper for him that we should keep, and Mr. Elliott says, "Well, it is late"—it was about 2 o'clock—and he says, "We are bound to meet a party in town; I will make out the other copy to-morrow," he says. Well, Mr. Kuzek thought it was all right and they went to town that afternoon, and Elliott didn't come back that next day. He was in town for about a week or ten days; then he stayed at home about two or three days—I couldn't say how long—and again went to town and stayed a couple of weeks. He

(Testimony of Mrs. Bertha Kuzek.)

came out again about the 2d of April, but I know he was not there the 1st of April, and worked about two days, and then Mr. Kuzek called his attention to drawing up the copy of the lease, so we could have one as well as they had. After supper, on the evening of the 4th of April, Mr. Kuzek, Mr. Elliott and myself, only being present—Mr. Magaha was not there—and while we were all sitting at the supper table, Mr. Elliott wrote out this paper, the duplicate. He laid the original lease on the table before him when he wrote this out and also the pencil lease was laying on the table at the same time; he wrote on down followed the original with this, and followed this on down as he did the first—the pencil one; and then after he got through with the writing of it, he handed the original over to Mr. Kuzek, and Mr. Elliott read this one out to the three of us, while Mr. Kuzek was holding the original; after he got through, he handed the piece of paper to Mr. Kuzek, and Mr. Kuzek looked it over and said he guessed it was all right. Mr. Kuzek handed this paper to me, still holding the original in his hand and the pencil lease, and I started and read this over aloud. Mr. Kuzek said, "All right; it is alike"; and I handed it back to Mr. Kuzek and he put the two papers together, and then he signed this lay and then he put it back to Mr. Elliott. Mr. Elliott signed, and then I signed as a witness, and then when Mr. Kuzek wanted to go over and call Mr. Magaha —he was working on the boiler at the time—Mr. Elliott says, "No, it is no hurry; Mr. Magaha can sign it to-

(Testimony of Mrs. Bertha Kuzek.)

morrow." Then the next following day, on the 5th of April, right after dinner, Mr. Kuzek called him into the little room we had and he signed this lay. I was standing in the door when he signed this; he read it before he signed it, and said it was all right, and handed it back to Mr. Kuzek, and it has been in Mr. Kuzek's possession, you might say, until it came into court. After the original was signed on the 9th of March Mr. Kuzek kept the pencil copy, and put it away with some other papers. I know two men by the name of Marsh. I was present at a conversation between my husband and Mr. G. W. Marsh; it was some time in March or April.

Q. In that conversation, did Mr. Kuzek ask Mr. Marsh if he had a very good lay?

A. He didn't say anything like that.

Q. And then did Mr. Marsh state to your husband that he had a very good lay?

A. He did not state anything like that in my presence.

Q. And then in that conversation, did your husband state to Mr. Marsh, "I am giving our boys 75 per cent and I hope they will pull through?"

A. No, sir, not to the best of my recollection did he ever state anything like that in my presence to Mr. Marsh. I have been slightly acquainted with Thomas Jacobs in the last two or three months.

Q. Do you remember a conversation alleged to have taken place in your cabin between Mr. Jacobs and your husband alleged to have been about the middle of March

(Testimony of Mrs. Bertha Kuzek.)

of this year, in which Mr. Kuzek told Mr. Jacobs that he was getting 25 per cent himself, and giving 75 per cent to Elliott and Magaha.

A. No; he asked Kuzek what he was getting and Kuzek replied that he was getting 75 per cent.

(Mr. Orton moved to strike the answer out as irrelevant, immaterial and incompetent.)

The COURT.—Objection overruled.

Q. Did your husband state to Mr. Jacobs at that time that he was giving the boys 75 per cent, and that he, Kuzek, was getting 25 per cent.

A. No, sir, not in my presence he didn't mention anything about it; during that conversation he did not refer to Mr. Magaha and Elliott as "the boys." I remember the conversation held some time in March or April, but to the best of my recollection nothing was said in regard to the terms of the lay which had been given by my husband to Magaha and Elliott.

Q. Did your husband ever state to any person in your presence that he had given a 75 per cent lay to the boys or the laymen? A. No, sir.

Q. Or retain 25 per cent of the gross proceeds for himself? A. No, sir, he didn't.

Cross-examination.

(By Mr. ORTON.)

Q. Now, Mrs. Kuzek, you say this document, Exhibit No. 3, the pencil draft, was presented by your husband already partially drawn up?

(Testimony of Mrs. Bertha Kuzek.)

A. Part of it was already.

Q. And Mr. Elliott drew up the balance of it, that is, wrote out some words and figures in pencil?

A. Yes, he wrote it out in pencil.

Q. And he started at the top and he went along and filled in the figures?

A. The pencil marks, you mean?

Q. He started at the top and read along until he came to a blank space and filled it in?

A. Where it is written with a pencil he started.

Q. That is down about the middle of the page?

A. Down pretty near the middle of the page.

Q. He first started in about the middle of the page?

Q. Now, the first pencil writing that he commenced to write is down near the center of the page?

A. Whether it is right in the middle or not, I couldn't say.

Q. It was not near the top?

A. Mr. Kuzek wrote that in with pen and ink.

Q. Mr. Elliott began down about the middle of the page? A. He began—yes, sir, a ways down.

Q. How far down from the top?

A. About where he commenced, it is saying something about 1900, some figures that I can't remember them.

Q. You are sure that he didn't commence right upon the first or second line to write?

A. No, I didn't say that.

(Testimony of Mrs. Bertha Kuzek.)

Q. Did he?

A. Did he commence at the top there—I said Mr. Kuzek wrote that.

Q. When Mr. Elliott commenced to write the paper he commenced to read it at the same time?

A. He didn't read the top; he read what was wrote in below.

Q. I will ask you to read then just exactly what he wrote and read then. Show me where he began to read?

A. Here, he put a figure down there.

Q. He put down the figure "1903"?

A. And said 1903.

Q. He said "1-9-0-3"? A. Yes, sir.

Q. And then what did he read?

A. He didn't read that (indicating).

Q. Didn't read that?

A. He just read what he put down.

Q. After he got down to the fourth paragraph, he began to read the printed words?

A. After he wrote it, he read it.

Q. Just show where he first began to read the printed lines.

A. He wrote that—he wrote that—

Q. He wrote this November, did he?

A. Yes, sir.

Q. Then he went to reading the printed words?

A. No, he didn't read that; all he read was just what he wrote.

Q. Did he read the printed matter?

(Testimony of Mrs. Bertha Kuzek.)

A. "M-o," month that meant, "8"—

Q. Show me the first printed matter he read?

A. "Legal representative or assign," he wrote, "75," he said "75."

Q. Did he read this printed matter here? Did he read that out when he was writing?

A. I think he did.

Q. What was the first printed matter that he read out? A. The first printed matter?

Q. The first printed matter that he read out loud while he was filling in this paper. Show us the first printed matter that he read when he began to write?

A. You want to give it in figures?

Q. I want you to give me the first printed words that he said out loud. A. "Charles F. Magaha."

Q. That is written words; I mean printed words.

A. Printed, oh, well, that is different. "To pay to said lessor, his legal representatives or assigns." He wrote, "75 per cent."

Q. That was the first printed words that he read out loud, was it? A. Yes.

A. "Legal representatives—

Q. That is the first printed part that he read out loud, is it, Mrs. Kuzek? Talk out loud, please.

A. He read it—he read this printed matter out that he read as he wrote.

Q. Where did he begin to read the printed matter? Please show me where he began to read the printed matter?

(Testimony of Mrs. Bertha Kuzek.)

A. You mean what he wrote down?

Q. I mean when he was writing it down.

A. He looked over this until he came down here and then he commenced—

Q. When did he first begin to read out—show me where he first began to read out?

A. "Pay to said lessor, his legal representatives or assigns."

Q. What is this word between "lessor" and "legal" there? A. "His."

Q. How do you spell "his"?

A. Some people spell when writing.

Q. How do you spell it?

A. Sometimes I make mistakes.

Q. That is the first place that he began to read the printed matter when he was writing it in?

A. "Said lessor, his legal representatives or assigns."

Q. Did he continue reading it down to the bottom?

A. He read what he wrote; that was all.

Q. He read what he wrote? What was done after he got through writing, got that filled up?

A. He got the original and put this on top in front of him. If you wish me to, I will show you. He put the original here and read down.

A. No, I don't care for any. He wrote down on the original the same as he had down there.

Q. Did he say it out loud as he went along writing the original? A. He didn't do that.

Q. Did he say that? Did he read it out loud?

(Testimony of Mrs. Bertha Kuzek.)

A. No, he didn't.

Q. He went right along and finished it?

A. He went right along and finished it.

Q. Then what did he do?

A. Then he read it over and Mr. Kuzek held this pencil copy.

Q. Mr. Elliott read over the original and Mr. Kuzek held this in his hand and compared it as he went along?

A. Yes.

Q. What did he do then?

A. Gave Mr. Kuzek this and had him sign it.

Q. Mr. Kuzek held the draft in his hand and Mr. Elliott had the original in his hand? A. Yes.

Q. And Mr. Elliott read it all over from beginning to end? A. Yes, the original.

Q. Did you read it over at that time?

A. No, he handed the original to Mr. Kuzek.

Q. So then you didn't read either of them over at that time?

A. Not when Mr. Kuzek first read that, he handed the original to Kuzek.

Q. I thought you said that Mr. Kuzek was holding the draft?

A. He held this while Elliott was reading the original.

Q. Where were you at that time?

A. I was in there.

Q. Were you looking at it?

A. No, I was listening.

(Testimony of Mrs. Bertha Kuzek.)

Q. After Elliott got through reading it, did you then read it over before it was signed?

A. He handed the original paper to Mr. Kuzek for him to look over and to sign, and he looked it over, the first line or two, and handed it over for me to read, and Mr. Kuzek held this one.

Q. (By the COURT.) Did you read it aloud or otherwise? A. I read it out loud.

Q. Mr. Kuzek held this draft in his hand?

A. Yes.

Q. Was he looking at it while you were reading?

A. I couldn't tell; I was reading the original.

Q. Was he looking over while Mr. Elliott was reading?

A. I think he was, he held it for to compare it.

Q. What did he say after he got through reading that over? A. After I got through?

Q. After Mr. Elliott got through reading it and he with holding this in his hand?

A. Kuzek?

Q. Yes. A. He told Kuzek to sign.

Q. What did Kuzek say?

A. He looked the original over and handed it back to Mr. Elliott, and he handed it back to him to sign.

Q. What did Mr. Kuzek say?

A. He looked at the paper and signed the original, and then Mr. Magaha signed—

Q. What was signed at that time?

(Testimony of Mrs. Bertha Kuzek.)

A. Said that they should sign and Mr. Kuzek and Mr. Magaha sign and Mr. Elliott sign, and Elliott says to sign as a witness, and handed the paper over to me—

Q. After Mr. Elliott finished reading the original, when Mr. Kuzek was holding this paper—when Mr. Elliott got through reading the original, did Mr. Kuzek say anything about it being correct or anything of that kind?

A. After Elliott got through—why Elliott said he guessed it was all right, and said something of the kind, and handed the original—

Q. Did Mr. Kuzek say anything of that kind?

A. I handed the paper over to Kuzek, and Mr. Kuzek looked it over, I said, and he passed the paper over to me, and said to read it.

Q. That was the first word that he said, was it?

A. Yes, sir; he says to read it over, and I read it and handed it back to him, Mr. Kuzek, to sign.

Q. Then what did Mr. Kuzek say?

A. He signed it.

Q. What did he say?

A. He said it was all right; he had read it and compared it, and he said that it was all right; I am tired of hearing this repeated.

Q. Did Kuzek say anything about the paper being like the one in his hand?

A. Yes, said it was all right.

(Testimony of Mrs. Bertha Kuzek.)

Q. Said it was just like the one he had in his hand, that he was reading from? A. Yes.

Q. Then you read out loud, and he compared it again —that is a fact?

A. I said Kuzek held this penciled while I was reading the original.

Q. Did he compare it at the time?

A. While I was reading it? I suppose he was.

Q. When you got through he said it was alike?

A. He said it was alike; I handed the paper back to Mr. Kuzek, the original, and he signed it.

Q. Now, then, that was according to your recollection on the 9th of March? A. Yes, sir.

Q. Was Mr. Taylor down there that day?

A. Not to my knowledge.

Q. Had Mr. Taylor been there before that, of the Beau Mercantile Company?

A. I think he was there.

Q. About a week before that, or something like that?

A. On the 3d.

Q. Do you say on the 3d?

A. He was to my cabin.

Q. You didn't see him out in the engine-house, did you? A. No, sir.

Q. It was about the 3d, then, that Mr. Taylor was down there?

A. Yes, sir, it was the day Mr. Elliott was moving provisions to my cabin.

(Testimony of Mrs. Bertha Kuzek.)

Q. Did Mr. Elliott go to town that day?

A. I could not say.

Q. Did he go to town the next day?

A. I don't think he did.

Q. You don't think he did?

A. The afternoon of the 3d, we were moving provisions in the afternoon. On the 4th he was also moving provisions in from the cabin.

Q. He could not very well be on the creek between two and five in the afternoon of either of those days—it would be impossible to be in Nome witout your knowing it?

A. It don't take over half an hour to go to town—between that time I couldn't say. I know he brought the provisions over the afternoon of the 3d and the afternoon of the 4th.

Q. Is it not possible that he went to town the afternoon of the 3d or 4th?

A. I know the time that he furnished the provisions.

Q. What time?

A. I could not state the exact hour; it was in the afternoon.

Q. How long did he work the afternoon of the 3d?

A. What do you mean, how long did it take to carry the provisions over?

Q. Yes.

A. I couldn't state that.

Q. How long did it take the afternoon of the 4th?

A. I could not say.

(Testimony of Mrs. Bertha Kuzek.)

Q. A couple of hours?

A. Perhaps a couple of hours, perhaps not that long. He used my dog and sled to haul the provisions over with.

Q. You are absolutely positive that it was a week after Mr. Taylor was down there the first time before this original lease was signed?

A. He was there the 3d and I am quite positive we signed that paper, the original, on the 9th. Whether he was there between that time I could not state.

Q. Are you positive this original lease was signed on the 9th, was it not signed on the 8th?

A. No, sir, it was signed on the 9th.

Q. Now, Mrs. Kuzek, along about the 3d day of April this paper which I now hold in my hand, this exhibit No. 2, was drawn up by Mr. Elliott?

A. Yes, sir.

Q. Now, after it was drawn up, it was also carefully compared with the original, was it not? A. Yes.

Q. Who compared it? A. This?

Q. Yes, with the original?

A. Mr. Elliott laid the original down on the table and put this on top of it and wrote out, just followed the same as this—

Q. What I want to ask you, who did the comparing after they were written?

A. After the two copies were written?

Q. After that one was written?

(Testimony of Mrs. Bertha Kuzek.)

A. Mr. Kuzek held the original and the pencil copy lay on the table.

Q. Who held that one there?

A. Mr. Elliott was reading this one.

Q. That was when?

A. On the 4th of April, I should say.

Q. On the 4th of April? A. Yes, sir.

Q. Were they read over more than once and compared at that time before they were signed?

A. Mr. Elliott read that over and then he handed both the papers—

Q. After he read it over, did Mr. Kuzek say they were alike? A. Yes.

Q. The same as he did when the first two papers were compared? A. Yes.

Q. Now, after Mr. Elliott had read it over and your husband had held the original, and then after that and after your husband had said it was all right, did you then compare it?

A. I read this one; I read this aloud.

Q. You read that aloud?

A. Yes, and Mr. Kuzek—

Q. Mr. Kuzek had what one?

A. He had the original one, the penciled one was on the table.

Q. Did anyone compare the pencil one with either of these at that time?

A. No, it was lying on the table.

(Testimony of Mrs. Bertha Kuzek.)

Q. This is your signature here, Mrs. Kuzek?

A. Yes, sir.

Q. Look at that paper and state whether or not that is not the affidavit you filed and signed in this case?

A. Yes, sir.

Mr. BRUNER.—Read it over.

Mr. ORTON.—We are going to read it over.

Mr. BRUNER.—I mean for her to read it.

Mr. ORTON.—Certainly.

(Witness examines paper.)

Q. I will ask you if you didn't sign the affidavit, part of which is to this effect?

A. I don't quite understand anything that you ask me.

Q. "We ask Mr. Elliott to at once make up our copy of the lease. Mr. Elliott said he would do so, and got the original lease and sat down and from it made the copy?" A. It contains that.

Q. You remember that—"After making the copy, my husband and I and Mr. Elliott compared it with the original lease."

A. I was there at the time we compared it, sitting right in the cabin when he made it out.

Q. "And also with the penciled lease to see if all of them were the same?"

A. The penciled lease was laying right between Mr.

(Testimony of Mrs. Bertha Kuzek.)

Kuzek and Elliott on the table; I say it was right there between them.

Q. You say here that you compared them and they were all the same? A. They were all the same.

Q. I will ask you to look at the first lease—you are absolutely certain about that, are you, that they are all the same?

A. Supposed to be, on the same blanks.

Q. Were they all the same?

A. They were supposed to be all the same, that is what I said, supposed to be all the same.

Q. Your husband compared them and said they were the same after comparing them?

A. Said they were all right.

Q. He said they were alike?

A. Yes, supposed to be made alike.

Q. I will ask you to look at the first lease, "To have and to hold unto the said lessee for the period of 1903 year from date." Do you find that there?

A. No, I don't find it all.

Q. Turn to the first paragraph. First I will read it from here: "First to enter upon said mining claim and premises on or before the 15th day of November, A. D. 1903"? A. 10th of December.

Q. What do you find it there?

A. 10th of December.

Q. 10th of November, isn't it?

(Testimony of Mrs. Bertha Kuzek.)

A. This is December. It is the same down here where it is written with the pencil.

Q. That is absolutely the same? A. Yes.

Q. "The year ending June the 5th, 1904, also give them right to sluice what pay dirt they have in dumps until finished"? A. Excuse me, where?

Q. Right here: "The year ending June the 5th, 1904"?

A. Yes.

Q. Is that the same? A. Yes.

Q. Also is not this: "Also give them right to sluice what pay dire they have in dumps until finished." Do you find that?

A. "With privileges to sluice what dumps they have left."

Q. You find that they are a good deal different, don't you?

A. They mean the same. That is what Mr. Elliott was saying they meant the same.

Q. Didn't you testify a moment ago that they were exactly the same?

A. It meant the same; that is what I meant to say.

Q. Then you were mistaken when you said your husband compared them and found them all the same, because there is a good many words in there that are different?

A. Mr. Elliott had said they meant the same, the words meant the same; that they should mean the same in the penciled one as in the written one.

(Testimony of Mrs. Bertha Kuzek.)

Q. Didn't you say that after Mr. Elliott read over the original and your husband holding this in his hand, didn't your husband say they were the same?

A. It meant the same. Elliott had said to them there he had written some words different and that they meant the same.

Q. When did he say that and what time?

A. I don't understand the question just exactly.

Q. Are you positive Mr. Elliott wrote in the word "1903"?

A. Yes, sir, Mr. Kuzek never wrote nothing but the pen and ink.

Q. Are you positive that he wrote "1903"?

A. He wrote everything that is written in pencil.

Q. What did he say when he wrote that word?

A. He wrote the figures there.

Q. Did he repeat the wording of the written part as he wrote it? A. What?

Q. At the time he wrote "1903," did he repeat it?

A. He repeated that.

Q. He said "1903," nothing else?

A. He repeated the word.

Q. What word? A. The figures.

Q. Did he say anything else?

A. All he said was what he wrote there.

Q. When he said "1903," did he say anything else at that point?

A. Did he say anything else, no.

(Testimony of Mrs. Bertha Kuzek.)

Q. Didn't say anything? A. No.

Q. Then where did he jump to?

A. He wrote the words in lead pencil.

Q. He wrote the word "November." Did he say "November," when he wrote the word "November"?

A. No.

Q. He didn't? A. No.

Q. When he wrote the word "November," he didn't say anything at all?

A. I am not positive that he said the word—I know very well when he got down below—

A. I am not positive whether he said that over or not; I am not positive that he said it.

Q. After he wrote the word—the figure "1903," he jumped down to the next word "November"?

A. He was writing the figures out.

Q. Then he jumped to the word "November"?

A. Yes, he wrote that down.

Q. Up above did he not at that time scratch out the words "day of" and write that "4" after "190"?

A. I don't know from that, it is very dim.

Q. After looking at it with the glass, after he wrote the figure "1903,'" did he scratch out "day of" and write "4"? A. He wrote "4."

Q. Did he say anything at that time?

A. I could not say positively.

Q. After that did he skip to the word "November"?

A. I think he did.

(Testimony of Mrs. Bertha Kuzek.)

Q. How about this "15" before that, didn't he write that first?

A. I couldn't positively swear to that.

Q. You don't remember him writing in the 15?

A. I couldn't swear to it.

Q. You remember him writing the November?

A. He wrote that, that is his writing.

Q. Do you see the word "of"? Do you know whether he wrote that in there?

A. I couldn't swear positive?

Q. Did he write the "3" right after the "0"?

A. He wrote that.

Q. Did he say anything about at that time?

A. I couldn't answer it.

Q. Could you say whether he scratched out the words in the line where there is written the word "M-c." 8"? A. He wrote that at that time.

Q. Did he say anything when he wrote that?

A. I think he did.

Q. What did he say?

A. I couldn't say, he wrote "M-c-.8"—

Q. He didn't continue reading this matter?

A. I could not say.

Q. Then he scratched out the words "least shifts of men," didn't he? A. Yes.

Q. Did he read over the third paragraph?

A. No, he didn't.

Q. He didn't read that at all?

(Testimony of Mrs. Bertha Kuzek.)

A. No; he read "to pay to said lessor or"; then he wrote this, "legal representatives or assigns 75 per cent—"

Q. When he got down to the word "fourth," then he began to read it out loud?

A. I am positive he read that out loud as he was writing.

Q. As he was writing it? When he got this written part finished, then he stopped reading the printed part?

A. There is no writing except this little place right here.

Q. Did he read any more of the printed part after he had written these three or four lines in writing?

A. No, he didn't—it is his writing.

Q. Did he read any of this printing?

A. No, he didn't.

Q. So the only portion of the printed lease that was read out loud was the fourth paragraph?

A. Yes, sir.

Q. Didn't you testify in your direct examination that he read out a good part of the printed part when he was writing it?

A. I said that he read that part there as he put it down.

Q. Isn't it a fact that you testified in your direct examination that when Mr. Elliott was writing in these

(Testimony of Mrs. Bertha Kuzek.)

different parts of the lease, that he read over a large portion of the printed part out loud?

A. If I did, it was because I didn't understand the question.

Q. Now, after Mr. Magaha signed that paper, which you hold in your hand, Exhibit No. 2, he gave it to your husband? A. This one given to my husband.

Q. And that has been entirely in your husband's possession ever since?

A. Except when it came here to court.

Q. You are positive about that?

A. Yes, sir; positive, except I took it to the recorder's office to get it recorded; it has been in his possession ever since then.

Q. Then it was not in his possession all the time?

A. I did take it to the recorder's office to record it.

Q. I will show you your affidavit as follows: "The next day Mr. Magaha came in and just after dinner my husband asked Mr. Magaha to sign the paper, and Mr Magaha took it up and read it over carefully and said it was all right and signed it. This paper had been the possession of my husband ever since."

A. Yes, sir.

Q. That is in your affidavit? A. Yes, sir.

Q. You had it in your possession very shortly after that?

A. He told me to take it down and have it recorded after that, and I took another down, some water right

(Testimony of Mrs. Bertha Kuzek.)

or something, and he told me to take it down and record it, and I got it and gave it to him again.

Q. Who went after it A. I went after it.

Q. Then what did you do with it?

A. I handed it to Mr. Kuzek?

Q. You say in your affidavit, "Affiant further states that she was present at the time her husband and Mr. Elliott prepared to make out a lease on the property; this was along about the 8th or 9th of March, 1904." you now have said it was the 9th, haven't you?

A. It was on the 9th.

Q. "At that time her husband desired that all parties should go to town and have a lawyer draw up the lease, but that Mr. Elliott stated that he had some blank lay and that he could make out the lease as well as anybody; and thereupon affiant's husband got the blank lay papers, which Mr. Elliott had previously given to him and sat down and commenced to write; after writing a few words Mr. Elliott said that he could write the lease probably better than affiant's husband; but he took a lead pencil and filled out the blank lease, which was to be used as a paper to copy from and from which the original lease was to be made out. The said pencil copy is now in my presence and it contains the following language: "4th. To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim." You remember that part of your affidavit?

A. I think I do.

(Testimony of Mrs. Bertha Kuzek.)

Q. Take the fourth paragraph and see whether or not it contains that language—read it and say whether or not this contained in the affidavit is true: "The said pencil copy is now in my presence and it contains the following language: 4th. To pay to said lessor or his legal representatives or assigns, 75 per cent of the gross output of said claim." Do you see that there?

A. I see that there, yes, sir.

Q. "After the pencil lease had been written out, and the terms agreed upon, the penciled lease was used by Mr. Elliott from which to copy and he thereupon wrote out in ink the original lease. In the original lease the words were written: "4th. To pay to said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim." After the original lease was written out by said Elliott, Elliott read said lease entirely through to my husband, my husband holding the penciled lease to see that it was a correct copy," of the original one? A. Yes.

Q. "The written lease was then handed over to me and I looked it over, and it being satisfactory, Mr. Kuzek signed it and Mr. Elliott signed it, and then Mr. Magaha signed it, and I signed it as a witness." What was done with the paper immediately after that?

A. I think Mr. Kuzek handed it to Mr. Elliott; I am not positive, but I think he did.

Q. Before or after it was signed?

A. After it was all signed, everybody had signed it,

(Testimony of Mrs. Bertha Kuzek.)

Mr. Kuzek wanted him to make out a copy of that other paper.

Q. What time of the day was that?

A. I should judge it was the 4th of March—you mean the 4th of March?

Q. Yes, the 4th of March. A. In the afternoon.

Q. About what time?

A. About two o'clock, after dinner.

Q. About what time was it that you got through?

A. With the writing?

Q. Yes, and signed it?

A. Well, I suppose it was—Mr. Elliott called his attention to it, he says, "It is now two o'clock."

Q. Was it two o'clock?

A. I think it was; I would not positively state it was two or when it was.

Q. He said, "It is now two o'clock"?

A. Yes.

Q. What else did he say?

A. That he wanted to meet somebody in town, and that he would make the paper out the next day.

Q. Then what happened then?

A. Mr. Elliott left.

Q. What happened right then before Elliott left?

A. He took the paper—the original—and I think put it in his pocket; he put it some place; I don't know where he put it.

Q. And then what did he do?

(Testimony of Mrs. Bertha Kuzek.)

A. They went to town then, wanted to go for some purpose—on the 9th of March I should say; I said the 4th, I meant the 9th of March.

Q. What did they do—started right off to town right away?

A. I can't swear to that; I didn't follow them up; I am sure they said they wanted to see a party in town.

Q. How long did they stay there, after the lease was signed before they left?

A. They went out of the cabin, I can't tell where to.

Q. That was when?

A. On the 9th of March.

Q. That was after two o'clock in the afternoon?

A. They were around there, somewhere around two o'clock.

Q. Who produced these blank leases?

A. If I am not mistaken, Mr. Kuzek had some blank papers; I think he said he had two in December that Mr. Elliott had given to him—I couldn't possibly state—

Q. Didn't you state in your affidavit this—when was that ink part written in that paper?

A. Sometime in December.

Q. In December?

A. That is what it says here,

Q. When was it actually written?

A. That part Mr. Kuzek wrote, he said he wrote it in December, I was not present when he wrote it—this part here was written on the 9th of March.

Q. When was the ink part written, if you know?

(Testimony of Mrs. Bertha Kuzek.)

A. I can't positively state.

Q. Did you see it written at all? A. No, I didn't.

Q. It was written when the paper was produced—at whose instigation was the papers produced?

A. Mr. Kuzek got these two blanks—got them sometime in December, he got them sometime.

Mr. BRUNER.—She misunderstood your question.

Q. On the 9th day of March at whose instigation were the blanks produced?

A. What do you mean by "instigation"?

Q. Who suggested it first?

A. Mr. Kuzek went and got the papers from the little box.

Q. I want to know who suggested that he should get them and bring them out?

A. The boys wanted to go to town; they came over to get the lay, and my husband went and got the penciled lease, which he had—he got the penciled lease, what my husband had already written out sometime in December, and Elliott wrote in this in pencil himself.

A. Elliott.

Q. Who got the blanks?

A. I think Mr. Kuzek got them; I would not be positive about it; I think Kuzek got them out.

Q. How many were there?

A. There was three that were wrote; I think Mr. Kuzek had more there at the cabin there.

Q. Isn't it a fact that Mr. Elliott stated at that time

(Testimony of Mrs. Bertha Kuzek.)

that he had some blank leases and that he would get them?

A. He brought some over in December; he brought some over before it was written off—I couldn't say. I think he did say something, I am not positive; I think he did say.

Q. As soon as Mr. Elliott said that he had got some blanks, and would get them, your husband went and got his blanks?

A. I think there was something to that effect; I would not say for sure; I didn't read everything that was said in the affidavit.

Q. Are you positive that one of these three blanks that were there, Mr. Kuzek had there in December, had writing on it?

A. Yes, the one in pencil was written out sometime in December. I think Elliott did say something about having the blanks—

Q. Now, I would like to have you show me in this penciled copy what part of it was written in December?

A. I think Mr. Kuzek made it out; whether he wrote it in December or not, I don't know; I was not present; I could not say whether it was on the 9th of March and dated it back, I could not swear to that.

Q. State what part of that was written when the blank was produced.

A. I didn't see him make it out; I don't know. I think the penciled part was made out then. I think it was written in December; I was not there.

(Testimony of Mrs. Bertha Kuzek.)

Q. Was the part that is written in ink already in there when it was produced that day?

A. Yes, it was, I think it was.

Q. All of it?

A. I am not positive; I think it was.

Q. You think it was all there?

A. I am not positive.

Q. Did your husband write anything in ink that day?

A. He might have; I could not say.

Q. You were there, weren't you?

A. He took the pen and was going to write, and Mr. Elliott said—he took the pencil and was going to write, he says, "I can write that better than Mr. Kuzek can."

Q. Your husband took the pencil?

A. I could not say whether he took the pencil or pen and ink, I could not say what it was.

Q. What part did your husband write on that day?

A. I could not say.

Q. Did he write anything that day?

A. He took the pen and was going to; I could not say whether he wrote anything or not.

Q. Is it not a fact that your husband did start and write a few words on the paper first?

A. He had written something there, he took the paper and sat down—he might have.

Q. Have you got any recollection about that matter at all as to whether he did or not?

A. I could not say whether he did or didn't; I think he didn't; if he did, he didn't write with a lead pencil.

(Testimony of Mrs. Bertha Kuzek.)

Q. What makes you so certain that if he did he didn't write with a lead pencil?

A. I can't say whether he wrote anything or not; he said something about writing a few words.

Q. You don't know whether he wrote anything or not, but if he did, he didn't write with a lead pencil?

A. No, there is no pencil writing written in by him.

Q. How do you know? A. I didn't see him.

Q. You don't know but what he wrote some that day?

A. He might.

Q. He might have written some, but if he did, you didn't know it? A. Yes.

Q. How do you know he didn't write with a pencil?

A. He didn't have the pencil in his hand.

Q. Did he have the pen in his hand?

A. I could not swear whether he did or not; the pen and ink was on the table.

Q. If you don't know whether he had the pen or not, how do you know whether he had the pencil?

A. I could not swear to it.

Q. He might have had the pencil?

A. I know pretty near his handwriting anyway.

Q. He might have had the pencil in his hand?

A. He might.

Q. He might have written a few words with the pencil; isn't that a fact? A. I don't see them.

Q. Then you are positive that he did not?

A. I don't think he did.

(Testimony of Mrs. Bertha Kuzek.)

Q. You don't think he did—that is as far as you can go?

Q. I will show you your affidavit where it says: "And thereupon affiant's husband got the blank lay papers, which Mr. Elliott had previously given to him and sat down and commenced t write." That is in your affidavit, isn't it? A. He might have.

Q. When you made this affidavit, you swore that he commenced to write?

A. I was not sure that he did not write.

Q. "After writing a few words, Mr. Elliott said that he could write the lease probably better than affiant's husband." Did you testify to that in your affidavit?

A. I think I did.

Q. So it is a fact that your husband did write a few words?

A. I didn't know that he did or did not.

Q. After refreshing your memory from this affidavit, you now remember that he did write a few words, isn't that a fact? A. I don't know.

Q. Did he or did he not?

A. I suppose he did.

Q. Do you remember whether he did or did not at the present time?

A. I knew he was going to write a few words, he might or he might not.

Q. Do you remember whether he did?

A. I could not say positively.

(Testimony of Mrs. Bertha Kuzek.)

Q. How did you happen to put in your affidavit, then, this statement: "And thereupon affiant's husband got the blank lay, papers which Mr. Elliott had previously given to him, and sat down and commenced to write." How did you happen to put that statement in there?

A. He had the paper there on the table, and writing, and Mr. Elliott said he could write better than he.

Q. He had the paper and was writing?

A. He was writing.

Q. He was writing? A. He was writing.

Q. "After writing a few words, Mr. Elliott said that he could write the lease probably better than affiant's husband." Is that correct? A. Yes.

And thereupon an adjournment was taken until 9:30 A. M., July 15th, 1904.

9:30 A. M., July 15th, 1904.

All present.

BERTHA KUZEK on the witness-stand.

Mr. BRUNER.—We have the memorandum-book here now. Do you wish to examine her on it?

(Further cross-examination by Mr. McGinn.)

Q. Mrs. Kuzek, I believe you testified yesterday that you remember that this lease was made out on the 9th day of March, 1904, for the reason that that day and that night Mr. Kuzek worked for Mr. Magaha and Elliott? A. Yes, sir, on the 9th of March.

(Testimony of Mrs. Bertha Kuzek.)

Q. And that you made a memorandum of the fact and that Mr. Kuzek did work the day and night of the 9th for them? A. I made a memorandum—

Q. Was not that testimony yesterday?

A. If I said anything about a memorandum, something like that.

Q. That is what you testified to yesterday, that you made a memorandum in your book to the effect that Mr. Kuzek had worked for them that day and night?

A. I made a memorandum, something to that effect; that is the reason I said on the 9th that he worked all night.

Q. Is this the memorandum that you had reference to when you were testifying yesterday?

A. Yes, sir, made out the lease.

Q. Can you show me anywhere in that memorandum-book anything that shows that Mr. Kuzek worked for Mr. Elliott and Magaha upon the 9th day of Marsh?

A. Only that I can say that he worked—.

Q. Can you show me anything in that book?

A. No, I can't show you anything—.

Q. Now, what you have in that book is that the lease was made out on the 9th of March?

A. It was written either the day after or the next morning.

Q. Why didn't you testify to that yesterday?

A. I could not think of everything at once.

Q. You couldn't think of everything?

(Testimony of Mrs. Bertha Kuzek.)

A. On yesterday I testified that the memorandum was that he went to work for them.

Q. You said that you put down in your memorandum-book that he worked for them the night of the 9th of March?

A. I can't say whether I did say that. I put down that he worked—I put down the 9th of March that the instrument was made out.

Q. Did you write that the same day the lease was made out?

A. I wrote that the next day or the next morning or the next afternoon, I didn't know which—it was on the 9th of March.

Q. What you wrote is, "made out lease on 9th of March." A. Yes.

Q. That is your own handwriting?

A. Yes, that is my own handwriting.

Q. Why is it that you wrote that so far back in the book?

A. Because other things were written in this part of the book for 1901.

(Book marked "Defendant's Exhibit No. 3" and introduced in evidence.)

Q. You are sure you wrote that in the book the day after the lease was made out?

A. The day after somewhere—

Q. Why did you write it there?

A. I wrote other things in there.

(Testimony of Mrs. Bertha Kuzek.)

Q. Have you any other reason that you wrote in there to fix the fact that the lease was made out on that day?

A. If I have any other reason?

Q. Yes.

A. If I had, I don't know whether I put it down or not.

Q. You don't know whether you had any other reason or not? A. Only as I stated before.

Q. What was that?

A. That I put it down. That on the 9th on account of Kuzek working that night and afternoon—of course, I didn't put it down on the paper in this memorandum, but I asked Elliott to get the "Nugget" for me that night.

Q. You put this memorandum of the fact that the lease was made out on the 9th day of March down so that you would know that was the night Mr. Kuzek worked for them, Elliott and Magaha?

A. Something to that effect.

Q. If he wanted to keep a memorandum of that fact, why didn't you put that in your memorandum book?

A. I could not write everything.

Q. Why didn't you just say that Kuzek worked for Magaha and Elliott the night of March the 9th?

A. I couldn't write everything.

Q. Don't you think that would have refreshed your memory better than to write that the lease was made out March the 9th? A. It might and it might not.

Q. Is this all in your handwriting?

(Testimony of Mrs. Bertha Kuzek.)

A. Some of it is mine and some of it is Mr. Kuzek's and some somebody else.

Q. Whose handwriting is that?

A. Some of this is Kuzek's writing. He sometimes spells his words wrong and I wrote over his writing; some of them are his figures. This is my writing—this is my writing. I corrected some of his—I corrected some of this.

Q. Are the figures all in his handwriting?

A. I could not swear that they are all his figures.

Q. Are they yours? Will you please point out yours?

A. Some are mine; I would not say positively.

Q. How about that "75" right there; on this page "April 5, 1901" at the top. Whose figures are those?

A. I wrote that.

Q. Right here, I mean. Whose figures are these?

A. I could not say positively whose figures these are.

Q. Are they yours or Kuzek's?

A. I couldn't answer.

Q. Can't you positively answer whether that is your handwriting? A. I could not say positively.

Q. Whose "5" is this at the top in "150"?

A. I could not say whether that is Kuzek's for sure. It looks as though it might be mine. I would not positively say that. I would not say whether that 100 is mine. I could not say; it looks like mine.

Q. Look at this "75," where it says "1 sack coal—75"; whose handwriting are those?

(Testimony of Mrs. Bertha Kuzek.)

A. I could not say; it is mine or Kuzek's or somebody else's.

Q. This is your memorandum-book?

A. There is something that I don't know anything about, the first part, who wrote that whatsoever.

Q. You know who wrote this in the book "April 5, 1901"; that is either in your writing or Kuzek's?

A. That is mine—I could not say whether that is his or mine.

Q. Either one of the two?

A. I could not say whether it is his or mine.

Q. I show you again the account on page which is marked "April 5, 1901," state what that account is?

A. Yes.

Q. Is that the account that was kept either by you or Stanley Kuzek?

A. It is somethings wrote down; I couldn't say now what it is; it is plenty long time ago and I can't remember just exactly what it is.

(Question read.)

A. Yes, sir.

Q. Didn't you testify a few minutes ago that this writing is what you had written over his?

A. He couldn't spell some words, he spells wrong; I know that I had written this.

Q. You wrote that there (indicating)?

A. Yes, I wrote that.

Q. That was an account that you kept?

A. That I wrote down; I can see it is written there.

(Testimony of Mrs. Bertha Kuzek.)

Q. You knew what you were doing when you wrote it? A. I wrote part and he wrote part of it.

Q. The two of you wrote it? A. Yes.

Q. There is nothing there but what was written by one or the other? A. I could not swear to that.

Q. Did you write that word "sacks"?

A. I wrote the balance.

Q. Who wrote the balance?

A. I think Kuzek wrote a part.

Q. Did you write these figures, you or Kuzek?

A. I couldn't say.

Q. Is there anybody else's writing there?

A. There are other things in here that I wrote—that I couldn't say.

Q. Did anybody else keep any accounts in here?

A. I couldn't say; they might have kept some accounts there.

Q. You wrote over it?

A. I might have written this or this, I couldn't say.

Q. You added it up?

A. I couldn't say that I added it up.

Q. You know you wrote the "sacks," part of this. Did somebody else put the figures in?

A. I suppose so.

Q. Who did add it up? A. I couldn't say.

Q. You don't know very much about this page?

A. Not so very much.

Q. You wrote a good deal of it yourself?

A. I wrote what is written along here (indicating).

(Testimony of Mrs. Bertha Kuzek.)

Q. Why did you say Mr. Kuzek wrote it if you don't know anything about it?

A. I didn't know anything about it. I knew the word was spelled wrong.

Q. You were anxious to have all the words spelt right in this private account?

A. I wasn't particular about it.

Q. You have gone over eight or nine or ten of the words, haven't you? A. I wrote over them.

Q. Who wrote what was there before?

A. I suppose Kuzek wrote some words here. Whether he wrote the figures or not I would not say. He must have written some; I couldn't say.

Q. He wrote some of the words. You don't know whether he wrote some of the figures?

A. I don't.

Q. You think somebody else got the book and wrote some of the figures there?

A. There might be such a thing.

Q. I show you another page which is marked at the top, on the second line of it is "1 rolled oats." Whose writing is that? A. This here is mine.

Q. What is the first line?

A. I don't know what that is.

Q. The first line you don't know anything about, the second line you wrote? A. Yes.

Q. If you don't know anything about what is on the first line, how did you happen to write the second and then have it added up?

(Testimony of Mrs. Bertha Kuzek.)

A. Where is it added up, this here?

Q. Yes.

A. I don't know what that is.

Q. Do you know what that page is?

A. Items of something.

Q. Items of what? A. Provisions.

Q. Who wrote it—did you write all of it or not?

A. I wrote some things.

Q. Point out what parts you wrote?

A. I don't know whether I wrote that or not; I hardly think I did write this.

Q. The second line you wrote? A. Yes.

Q. Did you write the balance of it?

A. No, I don't think I did.

Q. You just wrote one line on that page?

A. I believe I wrote that.

Q. Pointing to the third line at the bottom—who wrote the balance of it?

The COURT.—Did you write that?

A. No, I didn't.

Q. Who wrote the balance of it, Mrs. Kuzek?

A. It looks sort of looks like Kuzek's writing, this part here.

Q. Confine yourself to that page; do you know who wrote the balance of it except that one word?

A. Kuzek wrote this. I am not certain that he wrote that.

Q. Did he write it?

(Testimony of Mrs. Bertha Kuzek.)

A. I can't say; it is kind of mixed up there; I can't say whether he wrote it or I wrote it.

Q. Did anybody else have any knowledge about this account to write this?

A. I couldn't say the book has been in the cabin; several people has been in there.

Q. Do you think anybody else has been writing anything in there or not?

A. If I am not mistaken, I wrote that (indicating).

Q. You think if you are not mistaken you wrote the "5"? A. Just part of it.

Q. Not the figure but some of the letters?

A. I am not sure but what I wrote the figures or not.

Q. You are not so sure—what is that, 48 or 78?

A. 48—I am not sure, I think that is part of my writing.

Q. What is that? Do you think that is your writing?

A. I can read that, "1 tomatoes."

Q. Did you write the figures after that?

A. No.

Q. Just the written part? A. No.

The COURT.—Did you put any of the figures down there? A. I am not positive.

Q. These are the only figures that you think you might have put down. These are the only figures on that page that you put there except the 48?

A. I couldn't say whether I put that down or not. I hardly think I did; I am not positive of that either.

(Testimony of Mrs. Bertha Kuzek.)

Q. You only put the "48" down and you are not positive of that? A. I am not positive; no.

Q. Now, what was on this page that you have torn out immediately prior to "Nome, June 13th, 1901"?

A. I don't know.

Q. Wasn't it just torn out yesterday?

A. I don't know.

Q. Do you know when it was torn out?

A. No, I don't know anything about it. If it was done I didn't know it.

Q. If it was done, you didn't know it?

A. No, sir.

Q. I show you again the figures on page of "April 5, 1901" at the top, and the figures 1 "sack coal 75."

Mr. BRUNER.—Objected to on the ground that it has already been gone over.

Q. "1 sack coal 75"; did Kuzek write that?

A. He might.

Q. I will ask you if you know who wrote it?

A. I am not positive; he might have wrote that.

Q. Did you write it?

A. No, I didn't write that; I wrote some of that; I didn't write that.

Q. Confine yourself to the figures "75—1 sack coal"; did you write that? A. I did not.

Q. Did Mr. Kusek write that?

A. He might have.

Q. You didn't see him write it? A. No.

(Testimony of Mrs. Bertha Kuzek.)

Q. Don't you know his handwriting?

A. It is mixed up.

Q. The "75" isn't mixed up?

A. He might have wrote it.

Q. That is the best you can say?

A. He might have wrote it.

Q. Did you ever see Mr. Elliott's handwriting except in these leases? A. No, I can't say I did.

STANLEY KUZEK, called in rebuttal, testified as follows:

I am the plaintiff in this action, and am the husband of Mrs. Kuzek who has just left the witness-stand. I have known Charles F. Magaha about a year and Mr. Elliott since last fall. I am the owner of Marion Bench Claim No. 2. I let a lay to Mr. Magaha and Elliott, of the Marion Bench Claim, which was reduced to writing on the 9th of March, 1904. Mr. Elliott wrote it in the presence of Mr. Magaha, Mrs. Kuzek and myself, in my cabin on the Marion Bench Claim. I wrote part of this paper in ink. I wrote "5" 2 December" and "3" in 1903, "Stanley Kuzek, Nome, Cape Nome, Marion Claim." I didn't spell this right "J. P. Currie 12 July 1899—1—0—August—1899—87—XVI—Nome"; that is all I wrote in this. I wrote this if I remember right, that evening when I got those blanks. When Mr. Magaha brought some lumber up the first time to put up the cabin, I sent down and bought the blanks, and when I was alone in the evening, I started to draw them up, but I thought I

(Testimony of Stanley Kuzek.)

could not make them out as well as they ought to be, and I just put the recording dates and things there and then I put them in an envelope and thought I would leave them until some other time; all that I have just been reading I wrote in there that time, and I think that was on the 5th of December.

Q. You state that you all met together on the 9th of March. Now state exactly what took place at that time?

A. At that time Mr. Elliott and Magaha came to my cabin—it was shortly after dinner and I wanted to get my paper. I asked him if I should go with them to town to draw up the paper and they said it was necessary—"we will draw it up ourselves." I says, "You can draw it up; I started it up and didn't make it complete"; and Mr. Elliott says, "I can make out the paper." I says, "All right." I had the paper in my house; I sat down to begin—Mr. Elliott sat down alongside of me; I passed him this paper, he looked at it, and so we decided to draw up the draft with a pencil. So he did draw up the draft with the pencil and then took another clean blank and wrote out the paper with a pen and ink. After he did write it out then he says, "I have to change the line about sluicing," but he says: "It is the same meaning, anyhow." I looked that up, I says, "I didn't think that makes much difference." He says: "I just shortened it up." The he read the paper over and handed it to me. I looked over it. He read it aloud and then he handed it to me, and I

(Testimony of Stanley Kuzek.)

looked the paper over and handed it to my wife, and she read it and I held this paper in my hand to see that it all compared. It seems it all compared pretty well except this part, changed about sluicing the dump, and I thought that didn't have any effect in the paper. Then I signed, Mr. Magaha signed and Mr. Elliott signed, and I asked if I should call some of the other men to sign as a witness, and they said, "Mrs. Kuzek can sign as a witness." I said, "That is all right; that is satisfactory"; and so she signed as a witness. Then I handed him the three blanks and asked him to draw up a copy for me, as is usually drawn up, a duplicate, and Mr. Elliott looked at the clock and he says, "I don't think I have that much time to spare; I will draw up the paper to-morrow for you." I says, "That is all right —that is satisfactory"; and he says, "We have to meet some parties in town shortly after noon." I says, "That will be all right." They hired me to take off the boiler for them while they went to town; they went to town and I took care of the boiler for them that afternoon and that night till morning. They took the paper with them and I kept the pencil draft. When I asked Mr. Elliott to draw up the copy for me he says, "You keep this memorandum; I will draw up the copy to-morrow." He did not draw up the copy until about the 4th of April.

Plaintiff's Exhibit No. 2, the duplicate, was drawn up in my cabin by Mr. Elliott; Mr. Elliott, Mrs. Kuzek

(Testimony of Stanley Kuzek.)

and myself being present. Mr. Elliott came to the cabin, sat down, and pulled the paper out of his coat pocket, and I brought the blanks for him and he spread out his paper and filled up the blank according to his paper; after he had finished he read it over, and when he was through reading he passed both papers to me and he says, "You look over it; they are both right." I compared them and looked over them to see that the two were alike. I handed the second one—we call the duplicate—to Mrs. Kuzek, and I held the original while she was reading it over; when she was through she passed it over to me and I signed it, and Mr. Elliott signed, and I suggested that I go out and get Mr. Magaha from the boiler-room and get him to sign; and Mr. Elliott says, "It don't make any difference; he might be busy; he can sign it to-morrow morning." I says, "All right," and Mrs. Kuzek signed as a witness, and that was all that was done that evening. Mr. Magaha signed the next day, shortly after dinner; to my best recollection and remembrance he read it to himself; I then put the duplicate away with other papers in my box. In about a week or so I sent it to town by Mrs. Kuzek and she placed it on record; I also kept the pencil memorandum. Mr. Elliott took the original along with him as before. I first heard of the loss of the original paper on the 23d of May. It was in the counting-room of the Alaska Banking and Safe Deposit Company, in the town of Nome; Mr. Cowden, Mr. Elliott, Mr. Magaha and myself being present. I showed the duplicate to Mr.

(Testimony of Stanley Kuzek.)

Cowden, and Mr. Cowden said I was to have 25 per cent according to the terms of the duplicate lease.

Q. In paragraph IV of the original lease, what figures or letters were inserted in line one of said paragraph after the words "or assigns"?

A. After the words "or assigns" was the figure "75."

Q. Are you or are you not able to state that that is an exact copy of the original lease?

Mr. ORTON.—Objected to as not a proper question; it is for the Court to say whether it is or not.

The COURT.—Objection overruled.

A. It is the same; when Mr. Elliott filled up the duplicate and passed both papers to me, he says, "Look over them; they are both alike."

Cross-examination.

(By Mr. ORTON.)

Q. Mr. Kuzek, I show you the document here which is marked Plaintiff's Exhibit No. 3, which has been identified as the draft of lease; you are familiar with this?

A. Yes, sir.

Q. Now, when did you write that part of it which is written in ink?

A. I wrote that about the 5th of December.

Q. All of it? A. All of it in December.

Q. All of it was written in December and about the 5th of December? A. Yes, sir.

Q. You are absolutely positive about that, are you?

A. Yes, sir, I am very much so.

(Testimony of Stanley Kuzek.)

Q. That you wrote it on or about the 5th of December? A. Yes, sir.

Q. When you produced it on the day that the original lease was drawn up it had written in it just the writing that is in ink on it? A. Yes, sir.

Q. That is a fact, is it not?

A. Yes, that is a fact.

Q. You started in, did you not, and wrote a little more yourself?

A. I sat down and opened the ink bottle. I pulled the cork out and dipped the pen in, and there was more paper on the table, and I tried the ink or the pen, whatever you might call it, and then Mr. Elliott took it and he said he was going to write this over anyway, and he filled it out with a pencil.

Q. I will ask you if that is your signature, Mr. Kuzek? A. Yes, sir.

Q. You remember signing that affidavit?

A. Yes, sir.

Q. You read it over before you signed it?

A. Yes, sir, must have.

Q. I call your attention to this part of it, "Affiant further states that the defendant Elliott had a number of blank mining claim leases down at the mine, and that when they concluded to enter into a lay he told the defendants that they had better take the blank leases and all go up town and get a lawyer to draw them up, but that Billy the Horse (Elliott) said 'No';

(Testimony of Stanley Kuzek.)

that they could fill out the blanks. Affiant then sat down and wrote a few words at the top of the lease."

A. There was writing at the top of the lease. I had reference to this here—what is written here.

Q. Didn't you testify in your affidavit, "Affiant then sat down and wrote a few words at the top of the lease"?

A. I testified with reference to this that I had wrote, to this—it wasn't written at the same day. I might say I wrote part of it.

Q. Then this is not true in your affidavit when you say—start here—"Affiant then sat down and wrote a few words at the top of the lease; then the defendant Elliott took the paper and wrote in lead pencil."

A. He did.

Q. That is not true that you wrote a few words on that day?

A. I don't know; I wrote a few words on another paper at the time this was filled out; that was my writing.

Q. Will you please explain how you happened to explain this in your affidavit, why you put this in your affidavit, if it is not so, the words "wrote a few words at the top of the lease"?

A. I might have been mistaken in my memory then. I didn't explain it, I know. I was worked up at that time, and my head wasn't clear, and I would not remember all other things.

(Testimony of Stanley Kuzek.)

Q. How did your attorneys happen to put that in there of you didn't tell them that?

A. Maybe the attorney will say the thing different from what I will tell it to him; you know that very well.

Q. This is not true in your affidavit then, "Affiant then sat down and wrote a few words at the top of the lease."

A. Not in this form; it is not true in this form; it is true the writing was at the top.

Q. It is not true that after writing a few words the "defendant Elliott took the paper and wrote in lead pencil, filling up most of the blank."

A. Not in this form; it is true he filled up part of the paper.

Q. I will ask you to state whether or not you wrote anything else on the paper at the time, exhibit 3?

A. No, sir.

Q. Did you write that "1903" right there?

A. That is a thing I would not swear; you can test me by my writing.

Q. You might have written these figures "1903"?

A. Mr. Elliott's handwriting is very similar to mine. You see he filled up this and I left it blank.

Q. Mr. Elliott's handwriting and yours are very similar? A. To a certain extent.

Q. State whether or not you wrote that "1903"?

A. That I don't remember; it looks very much like mine.

(Testimony of Stanley Kuzek.)

Q. It looks very much like that?

A. Yes, to a certain extent.

Q. You would not swear but what you wrote that "1903," will you?

A. I would not swear whether I did or not.

Q. So it is possible that you wrote some of the pencil words on that paper.

A. To my best memory, I don't remember that I wrote with the pencil.

Q. Now, the 1903 is written in pencil?

A. Yes, sir.

Q. You would not say that you didn't write that, will you?

A. That I could not swear to, whether I did or not.

Q. Look at the word "November" written on the second line of the first paragraph, and say whether it is not a fact that you wrote that word "November" there which is written in pencil?

A. I just stated that I don't remember that I used the pencil; of this I am positive. I intended to fill it out with ink, and I don't remember using the pencil on it. About this word you say "1903 and November," I don't remember using the pencil.

Q. Is not it quite possible that you wrote this word "November"—it is quite possible that you wrote that, is it not? Don't it look like your handwriting—isn't that "R" just the same as the "R" at the end of "December" up here?

(Testimony of Stanley Kuzek.)

A. My best recollection is I don't remember using the pencil on it.

Q. You might have used the pencil, might you not, on this, Mr. Kuzek?

A. No, I don't remember of using the pencil; I remember using ink.

Q. You might have written a few of these words in pencil? The 1903 you already said you might have written that. Isn't it a fact that you might have written the word "November"—it is quite possible you might have written the word "November"?

A. It might be possible.

Q. Yes; now we come down to the word—take the figure "15" between the words "the" and "day" in the first line of paragraph first, right there; isn't that your writing there? This "15," this "15" right here is the one I am talking about. A. I would not say.

Q. It looks like your writing, doesn't it—that "15"?

A. I had done no writing on that paper; it looks similar to no letters.

Q. It is quite possible that you wrote that "15" also, isn't it? A. I would not say that I did.

Q. Or that you didn't? You would not say that you didn't?

A. To the best of my memory—I remember I filled it up—the ink—whether I put any more with the pencil, I don't remember that.

Q. It is quite possible, however, that you did?

(Testimony of Stanley Kuzek.)

A. I don't think so.

Q. You stated that it is possible that you wrote this "1903"—it is quite possible that you wrote the "15"?

A. No, I don't think so.

Q. You think it is not possible that you wrote the "15"?

A. Not to my best memory—Mr. Elliott filled it out in pencil.

Q. You are not willing to swear positively that you didn't make the word "15"?

A. I would not swear either way for this matter what I don't positively know. My best memory is that I started out to fill up the paper with the ink, and he thought he could fill it out better, and he filled it out himself altogether.

Q. Come down to the word "legal" in the fourth paragraph; that looks like "h-e-s," did you write that?

A. No, sir.

Q. You are positive of that? A. Positive.

Q. You are absolutely positive about that?

A. Yes, sir.

Q. And this "75," did you write that?

A. No, sir.

Q. You are positive of that?

A. Positive, yes, sir.

Q. Don't that look like your handwriting, this "75"?

A. A good many writing there looks like mine; it is similar to it. I could show you some receipts—I could

(Testimony of Stanley Kuzek.)

produce you the man that will show you writing very much like that.

(Question read.)

A. It looks similar to it.

Q. I show you "75" in this book "April 5"; did you make that "75"—did you write this?

A. Let me see.

Q. Did you write this—that is your handwriting, isn't it? Go ahead and examine it.

A. All this writing—I see a few words—we have several of these note-books, which we bought with some outfits from different people, that there was things written in already. I couldn't swear whether that is mine or not; it is three years ago since that was written.

Q. Look at that account. Don't you remember that account in that book? A. I don't.

Q. You don't remember it at all? Look it over and see if you don't remember that account.

A. I couldn't tell you—I wouldn't be sure of this—

Q. Do you recognize anything on that page with "April 5, 1901," at the top? That is in your handwriting, isn't it?

A. I don't remember of these things—where it was—

(Question read.)

A. Yes, sir, I do.

Q. This line here which has "1 sack coal," the word "coal" there and the "75"; that is your handwriting, is it not?

(Testimony of Stanley Kuzek.)

A. That I could not tell whether it is my writing, this "75."

Q. The word "coal" is in your handwriting?

A. That I would not swear to as I never make this kind of an "s."

Q. That has been written over by your wife. She has testified to that. Isn't that a fact, that this word "sack" is not in your handwriting—that that has been written over? A. Yes, it has been written over.

Q. The word "coal" is in your handwriting?

A. No, I don't think it is. I never make a "c" that way. I never put my "C's" this way in the same shape as this. I start at the top.

Q. Do you testify that any of the figures are in your handwriting at all? A. Yes, sir.

Q. You said there is something on that page in your handwriting. Show where on that page in handwriting there is anything in your handwriting. Will you now please point it out to me? Please turn over here, the page that says "April 5, 1901," at the top?

A. That I could not tell because I see handwriting similar to that—because I fool myself easy. I am not expert in identifying handwriting.

Q. This is your book?

A. This book is one I seen before. We bought it with different outfits, and there had been some writing in it already. I could not tell whether it is all—I am positive it is not all my writing, either my wife or myself.

(Testimony of Stanley Kuzek.)

Q. You recognize that book—did you ever see that book before? A. Yes, sir.

Q. Did you ever write anything in that book at all?

A. I might; I possibly did.

Q. Find in there some place that you wrote something in that book, please.

A. That is my marking—that is my drawing.

Q. Yes, find some writing of yours. Are those your figures? A. I couldn't say.

Q. That is at the page with "5" at the time; those are not your figures?

A. No, sir; I wouldn't say that they are mine.

Q. Can you find any place in there—is there any writing of yours in that book at all.

A. This number is "9." I make a funny "9"; that is mine.

Q. That "9"—you made these words where it says something—"May, 1901"—you mean the day that you wrote that? A. No.

Q. You don't know?

A. This "9" looks similar to that; it is not my writing.

Q. Is the "1901" your writing?

A. No, it is not; no, sir.

Q. See if you can find anything else written in that book at all?

Q. I show you another page from this book which may be identified as having "1" something with the fig-

(Testimony of Stanley Kuzek.)

ure "23" on the top line, and I will ask you whether or not any of that page is in your handwriting?

A. It looks similar to my writing.

Q. This is your book, isn't it?

A. My wife has been keeping more or less this book in her possession; I don't remember.

Q. I call your attention to the words "3 hams," I think it is; isn't that your writing there?

A. I wouldn't swear that it is my writing.

Q. It is not your wife's writing?

A. No, I don't say it is her writing.

Q. Is it not a fact that you wrote that and can remember that? A. I am not positive.

Q. What is your best judgment—your best recollection?

A. I could not state that I wrote this because I have not had the book in my hands for so long a time I don't remember.

Q. Did you ever have this book at all?

A. I know it was brought from Seattle from Cooper & Levy?

Q. Did you ever see it before? A. I seen it.

Q. Did you ever write anything in that book?

A. I don't remember.

Q. You don't remember whether you did or not?

A. I don't.

Q. Did you keep any accounts there?

A. That I don't remember, as I told you first this

(Testimony of Stanley Kuzek.)

book came in my possession from somebody—somebody had it before.

Q. Can you tell your own handwriting when you see it?

A. I am not an expert. I have seen other handwriting that is identical with mine.

Q. Whose handwriting did you ever see that was identically the same as yours?

A. A fellow by the name of Howard; he was working for me; his figures would pass for mine just exactly.

Q. How about his writing?

A. And his writing pretty much, some little difference, especially capital letters; he used a different shape.

Q. You are not able, are you, to look in your own memorandum-book and state whether or not that was written by you?

A. That is not my own; of course it was in my house, Mrs. Kuzek sometimes used the memorandum. I don't remember whether I ever had anything to do with it or not.

Q. And you will not say whether this, "three hams—25," are not in your handwriting?

A. I would not swear to it.

Q. What is your best judgment?

A. I would not swear that is my handwriting, because I would not remember.

Q. Don't you know your handwriting after you see it?

(Testimony of Stanley Kuzek.)

A. There is some other handwriting that is similar to it I see.

Q. Does that look like your handwriting, that "three hams—25"? A. It looks similar.

Q. Looks just exactly like it?

Mr. BRUNER.—We will admit it is his handwriting for the purposes of this case.

Mr. ORTON.—The words "three hams 25"?

Mr. BRUNER.—"Three hams 25."

Mr. ORTON.—How about this other over here, "1 sack coal—75"? I could not make Mr. Kuzek testify that that was his writing. Mrs. Kuzek testified that she wrote it over the "sack."

Q. There is a question in regard to it. Is it yours, Mr. Kuzek?

A. I don't know; there is different handwritings in there; I couldn't tell.

Q. You would not write a page like that at one time and have it go altogether out of your mind?

A. Maybe—

Q. Is it or is it not?

A. That was three years ago in 1901.

Q. You don't remember that far back?

A. Not unless something unusual happened.

Q. Do you remember when your wife wrote that?

A. No, sir, I do not.

Q. You don't have any idea when she did it?

(Testimony of Stanley Kuzek.)

A. I don't know; I never went over the account with her.

Q. Do you know what used to be written at this point? A. No.

Q. I will ask you to look at this page "Nome, July 17th," which is written at the top, and say if you wrote that? A. No, sir.

Q. It reads as follows: "Nome, July 17th. Received from Mr. Kuzek the sum of $10.00 in full payment for two days' work." Signed by a man by the name of McNeil? A. It seems to be his handwriting.

Q. Is it his handwriting all the way through or not?

A. It seems to me; I could not tell now.

Q. You don't know whether it is his handwriting or yours? A. It is not my handwriting.

Q. What was written on the opposite page before it was erased? A. I don't know.

Q. You are not able to recognize your own handwriting. How are you able to state to us that the word immediately before "legal representatives" in exhibit 3 was not written by you, if you don't know your own handwriting?

A. Because I don't remember using the pencil on this instrument.

Q. You don't remember whether you did or not?

A. I remember writing with ink.

Q. You didn't write anything with ink, or if you did, you don't remember,and you don't remember whether you used the pencil or not; so how are you able to state

(Testimony of Stanley Kuzek.)

positively that you didn't write this word before "legal representatives," "his"—supposed to be "his"—whatever the word may be. Isn't it a fact that you make an "h" like that? A. It looks similar to it.

Q. It looks similar to your "h"? A. Yes.

Q. You always make an "h" just in that fashion?

A. Sometimes, not maybe. I write different on account of not writing for a long time—sometimes when I am not using a pencil or a pen for some time when I am working and have to write, I make a different letter than if I get used to writing.

Q. I will ask you to look at the "h" in this word "3 hams—25." That is admitted to have been written by you, and I ask you if that "h" isn't very much like the word that I just showed you? A. It looks similar.

Q. When you look at these two words here, this word "ham" and this word "his" or "h-e-s," and examine them, don't you think it very likely that you wrote this word "h-e-s"? Look at this "h" here and this one?

A. This "h" is different; it is rather more crooked this way; it is a little drawn down; it looks like this one.

Q. You are not able to state positively that you didn't write it? A. I could not state positively.

Q. You could not state positively that you didn't?

A. To my best knowledge, I stated that I didn't.

Q. You are not positive about it?

A. What do you mean?

(Testimony of Stanley Kuzek.)

Q. You are not positive that you didn't write that—you might have written that?

A. I am positive that I didn't.

Q. You are absolutely positive that you didn't?

A. What do you want to get at?

Q. Are you absolutely sure that you didn't write that word "h-e-s"?

A. That is my best memory; I never used the pencil on this paper.

Q. You admit that you might have written this 1903, that you admitted?

A. I told you it looks similar to my writing.

Q. You already told me that it was possible that you might have written it. Didn't you testify that this morning? A. I testified that it looked similar.

Q. Didn't you testify this morning that it was possible that you wrote that 1903?

A. When you asked me that time I allowed myself to repeat your word, it was my intention—

Q. Isn't it a fact that you testified this morning that it was possible that you might have written the penciled figures "1903" in that paper; didn't you testify to that this morning?

A. I told you to my best memory that I didn't use the pencil.

(Question read.)

A. Perhaps I did, because I was mixed up when you use so many terms; I repeated your words.

(Testimony of Stanley Kuzek.)

Q. At this time have you changed your mind and do you know that you didn't write that "1903"?

A. My best memory is I don't think I used the pencil on this paper.

Q. I want to know whether or not you know that you did write it or did not? A. I wrote this.

Q. I am asking you about this. Please confine your answer to this one. I am asking you if you are absolutely sure that you didn't write this 1903?

A. I don't think I did.

Q. Yes or no? A. No, sir.

Q. You are absolutely sure that you didn't write the word "h-e-s" immediately before "legal representatives"? A. No.

Q. You are not absolutely sure? Are you absolutely sure that you didn't write the figures "75" in the first line of paragraph fourth? A. No, sir.

Q. I will ask you if it is not a fact that the figure "75," being the last figure at the end of the first line of paragraph fourth of exhibit 3, looks exactly like the figure "75" after the word "coal" on the page of this memorandum-book, which has "April 5, 1901" written at the top? That "75" here and this "75" here, if they don't look exactly alike?

A. It looks by looking at it simply—it looks alike, but as I explained before, the "7" is drawn from the shoulder and there is a slant—more slantways; it is sort of cut off—it is sort of cut down, cramped, this way, and this is more longly drawn.

(Testimony of Stanley Kuzek.)

Q. You don't think they are alike?

A. If I look at them quick, yes.

Q. How about the "5's"? Don't they look alike?

A. The "5's"; let's see. No, sir, they are not.

Q. They don't look alike?

A. No, they are not; let's see if I can explain that. The "5" in the book is more rounded up on the bottom, and this here is about half drawn this way (indicating).

Q. You are looking at the wrong "5."

A. That is just the same; this has a very little turn and this here has quite a turn.

Q. Isn't it a fact that you always make a "7" by making three strokes by starting upward this way and this at the finish, making three strokes to the "7"?

A. I do sometimes.

Q. Don't you always make the stroke that way?

A. In making the "5"—

Q. And in making the "5," don't you always connect the tail right to the top of the letter? Don't you always do that?

A. I try to do the best I can; yes, sir.

Q. Isn't it a fact that you always write the figure "3" as it is written in the second line of the first paragraph of exhibit 3, after the "190"?

A. I would not say that I do.

Q. You would not say that you don't?

A. My memory is I don't.

Q. You are not sure that you don't?

(Testimony of Stanley Kuzek.)

A. I say that to my best memory; I think that is plain.

Q. You are not absolutely sure, are you?

A. No, I would not swear; I am not sure of anything except death.

Q. That is the only thing that you are sure of?

A. Yes, sir.

Q. You are sure that you wrote the ink part there?

A. Yes.

Q. Then that is one thing that you are absolutely sure of? A. Yes.

Q. So you are mistaken when you said that you are only sure of death?

A. Anything that I am not sure of; I would not say that, I am sure; I am sure that you will die.

Q. You are equally sure that you wrote this ink?

A. Yes, sir.

Q. Equally sure? A. Equally sure.

Q. Isn't it a fact also that you wrote the word "November" that is immediately before the letters "A. D." in this first paragraph?

A. No, sir; I don't remember that. I could not say that I did.

Q. After Mr. Elliott had written out this original lease, he read it out loud, did he? A. Yes, sir.

Q. And you held this draft or copy of it to see that they were alike? A. Yes, sir.

Q. You found them alike?

(Testimony of Stanley Kuzek.)

A. Yes, sir; except the few words at the last that Mr. Elliott said were different—a few words about sluicing the dumps.

Q. That was the only difference in the two?

A. There was nothing, sir; that would injure the paper.

Q. Take this draft. I will ask you to state if it isn't a fact in this one, it says "15 day of November," and here it says "10th day of December." How do you account for that discrepancy if they were alike? How do you account for that if you say they were alike?

A. That was the third paper when that was written.

Q. This third paper was exactly like the other one, was not it a copy, these two?

A. To tell the truth, the important part, as to about the percentage and the time of the lay, that was what I was watching most.

Q. Now, if you held one paper and compared it, while the other was read, and afterwards read it, how do you account for the fact that they are different at that point if they were originally alike?

A. He drew my attention to this, when I come to think of it. Mr. Elliott said when he was looking at it—when we decided to date it the 5th of December—he said he didn't come on the ground in possession till about the 10th, so he wrote 10th, I believe, in the original, and copied it the same way in this, the 10th of December. I knew those changes were not important;

(Testimony of Stanley Kuzek.)

they would not injure the agreement; and this agreement, as to the percentage and the time of the lay, they agreed in these papers.

Q. Now, isn't it a fact that the paper you held in your hand and the original were not exactly alike; they were different in this particular, that this written part down here—

A. The written part to this lay I didn't care to dispute over because that was past time already.

Q. Now, you don't know when you held this draft that these figures were in here and that they were not in the original?

A. I supposed he didn't put that 1903 because he was making this in 1904; in April this was drawn up.

Q. Why was this "1903" inserted in the draft at all?

A. Because this was drawn up beginning "1903," referring to the 5th of December.

Q. So you didn't know when you were reading over the original, when you got the word "1903" there, that they were omitted?

A. As I say, I didn't consider that was—I never expected any trouble whatever. If I was expecting any trouble I would have watched that wording and had it to be perfect.

Q. At whose suggestion were the words inserted in this that the claim was to be worked with at most eight men?

A. Yes, sir; that was inserted—that was important,

(Testimony of Stanley Kuzek.)

about how many men to work. I didn't want to give them the right to hire a hundred men or whatever they could to work out the whole claim, because I limited them as to the number of men they could work, and I limited the time. I was looking especially about the men and the percentage and the time which they were to keep the ground.

Q. Your idea was that you were getting such a small percentage that you didn't want them to work more than eight men?

A. I considered eight men a big crowd on that kind of ground. My idea was that they was working on a small percentage and to give them a big crowd of men to work, to take out this way—

Q. Why did you limit the number of men if you wanted them to have a big crowd?

A. I might just as well give them the whole thing if I didn't limit them.

Q. You expected that the cleanup in the spring would be $25,000?

A. I didn't expect any such a thing; there was people talking about that.

Q. Billy had told you that he thought there would be $25,000, hadn't he?

A. I was not positive. It is hard to estimate what a cleanup will be.

Q. What did you think the cleanup would be at that time? A. It was simply from thinking.

Q. What did you think?

(Testimony of Stanley Kuzek.)

A. Sometimes I might think there would be $100,000 in the claim.

Q. Did you think at that time that the cleanup was going to be $100,000? A. No, sir; I didn't.

Q. What did you think the cleanup was going to be at that time?

A. I thought if the ground held out well, until, say, June or the latter part of May, the cleanup would be between twenty-five and thirty thousand.

Q. And your share of that would be three-fourths then? A. Yes.

Q. You didn't count on the fact that you believed these laymen were going to clean up between twenty-five and thirty thousand dollars in the spring, and that your share of it would be 75 per cent, and that you still have the claim left—you were willing to sell the whole claim, together with another claim for $23,000, and only take $3,000 cash; that is a fact, isn't it?

A. I was expecting that—I was not sure of it—I always figure that one bird in the hand is better than a dozen in the bush.

Q. You knew that you were to get 75 per cent of what came out of the dump?

A. I didn't see the gold come out.

Q. You didn't see the gold?

A. That was in the dump; I didn't know how much.

Q. You panned the dumps?

A. I did some panning from samples that were taken out of the buckets.

(Testimony of Stanley Kuzek.)

Q. You thought it was better thing to get in your hand the $3,000 in cash, was it not?

A. And the rest of it was to be a short payment—to get $3,000 in my hands and also the claim until it was paid; I was to have security on the claim.

Q. You expected to get $3,000 in cash; then you were willing to accept your share of the cleanup to apply on the $23,000? A. Yes, sir.

Q. You believed there was going to be between twenty-five and thirty thousand dollars cleaned up from the dumps, and you were willing to take—you were also expecting to take the royalty and apply it on that $23,000, to secure you, did you not—whatever came out as royalty was to be paid to you also?

A. I would keep the claim in my possession until it was paid.

Q. You were to get $3,000 in cash?

A. Yes, and also short time on the balance.

Q. And also to get 75 per cent of the cleanup?

A. Yes, sir.

Q. Now, at that time, didn't you expect the $3,000, and the 75 per cent of the cleanup would amount to $23,000?

A. That was simply business—suppose your pay didn't hold out, then you didn't clean up that much.

Q. You would have the claim left besides?

A. Then I had the $3,000 down, and if they didn't make the payments, then I had the claim left.

Q. You never had much confidence in this claim?

(Testimony of Stanley Kuzek.)

A. I had that much confidence in 1902—that I held the claim since 1902.

Q. You felt confident that the pay was going to hold out and that you were going to get 75 per cent of the cleanup— A. Yes, sir, I did.

Q. You felt pretty confident that the cleanup was going to amount to between twenty-five and thirty thousand dollars, didn't you?

A. I thought if the pay held out, I say, and if it didn't, it wouldn't.

Q. You were confident that the pay was going to hold out? A. Yes.

Q. And, therefore, you must have been confident that the cleanup was going to be twenty-five or thirty thousand dollars? A. Yes, but I wasn't sure.

Q. You were absolutely sure that you had confidence in it? A. I had confidence in it.

Q. Notwithstanding that fact, then, that you were to have three-quarters of the cleanup, and you felt confident that the cleanup would be that much, you were willing to sell the whole claim for $23,000, together with another claim, and accept payment in the manner stated?

A. The other claim didn't amount to much—and even on that claim there wasn't a great deal left.

Q. You didn't expect these laymen to work the entire claim out, did you?

A. They worked out half of the good pay or more, as far as I know.

(Testimony of Stanley Kuzek.)

Q. You expected them to work out half or more of the good pay? A. Yes.

Q. At what time were you speaking when you state on direct examination that this claim is the richest claim in that vicinity—when did it become known to be the richest mining claim?

A. It became known to my knowledge in 1902, the early part of the summer or rather the beginning of the winter.

Q. That was the early part of the summer when?

A. 1902.

Q. Ever since then you have known it was the richest mining claim in that vicinity? A. Yes, sir.

Q. You knew that in the fall of 1903, did you?

A. 1903, yes.

Q. What time of the day was this original lease drawn up? A. Shortly after noon, after dinner.

Mr. BRUNER.—Object to the question on the grounds that this matter has been very fully gone into before on this matter.

The COURT.—Objection overruled.

Q. What time did you finish it?

A. Shortly after commencing; it didn't last very long.

Q. It was about 2 o'clock in the afternoon when you got through? A. Yes, about that time.

Q. 1:30 or 2 o'clock; about 2:30, wasn't it?

A. I would not say the exact time; it would not be

(Testimony of Stanley Kuzek.)

half-past two, because Mr. Elliott and Magaha was to be there at 3 o'clock in town. I could not say; it was somewhere 2 o'clock—whether after or before I could not state.

Q. It was after 2 o'clock, wasn't it?

A. It might have been after 2.

Q. As soon as you drew it up, Elliott and Magaha came to town with it? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. You are positive that was the 9th of March?

A. Yes, sir.

Q. What makes you absolutely positive on that subject? A. The date of the time it was drawn up?

Q. Yes?

A. What makes me think about it is that Mr. Elliott when he made the writing, was looking at the calendar, and he says, "What is the date—the 9th?" I says, "This is started." I started to draw it up, and dated it the 9th of December. It might be all right to date it at that time, as it being begun. He says, "That will be all right."

Q. That is the reason why you remember?

A. Yes; if it is necessary, I can give you an explanation.

Q. Was Mrs. Kuzek there when Mr. Elliott looked at the calendar and said it was the 9th?

A. The 9th of the month, yes, sir.

Q. Mrs. Kuzek was present?

A. I think she was.

(Testimony of Stanley Kuzek.)

Q. She was right there?

A. I don't know whether she was sitting down; she was on the opposite side of the table.

Q. She was in the room?

A. Yes, sir; I don't know whether she took notice of that or not.

Q. Of course not. I knew you didn't know whether she was there or not? Was Mr. Taylor there that day?

A. No, sir. There would not be no time.

Q. Was he ever there before then?

A. He was, yes sir.

Q. How many times?

A. One that I know of before that.

Q. When was it—how long before that.

A. It was—whether it was the 3d or 4th of March—it was in that neighborhood.

Q. Was Mr. Cowden there?

A. No, sir; I never saw Mr. Cowden there. I heard he was there, but I didn't see him.

Q. When was it that you heard he was there?

A. I think it was later, sometime later—whether a week or two, I could not say.

Q. Isn't it a fact that they were both there the day before the paper was signed on the 8th?

A. If they were there, I could not say.

Q. You heard they were there?

A. Yes, sir; I heard they were there.

(Testimony of Stanley Kuzek.)

Q. You knew that Mr. Taylor was there the 3d or 4th of March? A. Yes, sir.

Q. That you know of your own knowledge?

A. Yes, sir.

Q. Did you know at that time what Mr. Taylor was there for? A. I didn't know.

Q. Do you know what Mr. Cowden and Taylor were there for when they were together?

A. I didn't know, sir.

Q. Do you remember whether or not—do you remember when Mr. Taylor was there at the time you saw him personally—isn't it a fact you had some conversation in the boiler-room with him?

A. Shall I repeat the conversation?

Q. Isn't it a fact that you had some conversation there? A. A very few words.

Q. Mr. Taylor had been down in the drift, the workings of the claim? A. That is what I heard.

Q. Didn't he bring some dirt back and pan it there?

A. When I came in the engine-room Mr. Elliott had the pan and had it worked pretty well down panning. I was looking for a pan to go down and get some dirt, and I stopped there a few minutes, and he had it about pretty near cleaned, and I says, "What do you think of it, Mr. Taylor?" And he says, "That is about as good as I have seen in this country." I went down into the drift and I left them in the engine-room.

Q. That was all the talk that you had?

(Testimony of Stanley Kuzek.)

A. That was all the talk we had.

Q. You are positive nothing was said about the lay?

A. No, sir, not to me personally.

Q. Didn't you tell Elliott in the presence of Taylor that he could have the papers drawn up right away and take them to town? A. No, sir.

Q. You are absolutely positive of that?

A. Absolutely positive.

Q. And didn't Mr. Taylor ask Mr. Elliott in your presence what kind of a lay he had?

A. No, sir.

Q. Nothing of that kind ever occurred?

A. No, sir, nothing of that kind ever occurred.

Q. Nothing of that kind ever occurred?

A. Nothing of that kind ever occurred.

Q. You are absolutely positive, are you, that you have never told anybody at all that Elliott and Magaha were to receive 75 per cent of the golddust that came out of this claim, or anything of that kind?

A. No, sir.

Q. You are absolutely positive, are you, that you have never told anybody that Mr. Elliott and Magaha were to receive 75 per cent?

A. No, sir—I am positive.

Q. You are positive? A. Yes, sir.

Q. You heard these gentlemen testify on the stand that you told them that? A. Yes, sir.

Q. Every one of them is telling a lie?

(Testimony of Stanley Kuzek.)

A. I should say they did. They told me lies in the bank. Mr. Cowden told me twice that it was 25 per cent to the lessor instead of 75.

Q. Mr. Cowden read the paper over and handed it back to you and says that the paper itself right on the face of it says that you were to receive 25 per cent?

A. That is what he said.

Q. How did you happen to save the pencil memorandum, Mr. Kuzek? A. How did I happen to save it?

(Question read.)

A. I didn't get the duplicate, so I thought I would keep that in the event anything turned up and I didn't have a duplicate of it. I was supposed to keep that.

Q. You had been working for several months without a paper at that time? A. Yes, sir.

Q. You never felt uneasy about it?

A. Well, there was no paper on either side then.

No paper on either side then. I thought if there was any controversy, we would have just as good a chance as they would.

Q. Did you expect any controversy at that time?

A. No, sir.

Q. After the paper was made out, did you expect to have any controversy?

A. I didn't pay much attention to it; I was waiting patiently until Elliott got sobered up, and I could get him to draw the paper up for me. I didn't pay much attention to what was going to.

(Testimony of Stanley Kuzek.)

Q. Why did you save the pencil memoranda, then, after you got the other one?

A. I kept it with the other papers we had there; it didn't take extra room for it.

Q. Why was it that you were willing to let these parties work there on an oral lay when you were to receive 75 per cent of the gross output—why didn't you have it reduced to writing in the first place?

A. It was understood that sooner or later we were to draw up the paper, and we neglected it from day to day.

Redirect Examination.

(By Mr. BRUNER.)

Q. I present to you a paper marked "Plaintiff's Exhibit No. 3," and ask you whether or not that paper has had any words added to it since it was drawn up on the 9th day of March of this year—have any words been written or letters or figures since the 9th day of March, 1904?

A. No, sir, there is nothing added to it.

Q. That paper is as it was filled out that day?

A. Yes, sir.

Mr. BRUNER.—That is all.

Redirect.

Q. I present to you the paper marked "Plaintiff's Exhibit No. 3," and ask whether or not that paper has

(Testimony of Stanley Kuzek.)

had any words or figures added to it since it was drawn up on the 9th day of March of this year?

A. No, sir, nothing has been added to it; the paper is now as it was filled out that day.

Mr. ORTON.—We offer in evidence the affidavits of Mr. and Mrs. Kuzek.

Mr. BRUNER.—Objected as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled. Papers admitted.

(Affidavit of Stanley Kuzek marked "Defendants' Exhibit No. 4." Affidavit of Bertha Kuzek marked "Defendants' Exhibit No. 5.")

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff.

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,
Defendants.

Opinion.

This cause coming on regularly for trial before the Court, and the parties being present, and appearing also by counsel, and having offered their evidence respectively, and the cause having been argued by counsel for plaintiff and defendants, and having been submitted

to the Court, and the Court having duly considered the same and being sufficiently advised in the premises, now

Finds that the allegations of the plaintiff's complaint have not been sustained by the evidence, and further finds that the allegations of the defendants' answer as to the terms of the original lease have been clearly and convincingly sustained by the evidence; therefore, the Court

Orders that proper findings and decree be prepared in accordance with this memo. opinion, and submitted to the Court.

Dated, Nome, Alaska, July 23d, 1904.

ALFRED S. MOORE,
District Judge.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,
Defendants.

Findings of Fact and Conclusions of Law.

The above-entitled action came on regularly for trial before the Court without a jury at a special term of said court, begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April,

1904, and was tried on the 11th, 12th, 13th, 14th and 15th days of July, 1904. Messrs. A. J. and Elwood Bruner appearing as plaintiff's attorneys, and Messrs. Jno. L. McGinn and Ira D. Orton appearing for the defendants, and said cause having been tried and argued by counsel, and submitted to the Court, and taken under advisement, now at the next special term of said court, begun and holden at said town of Nome, commencing July 13th, 1904, the Court makes in said cause findings of fact and conclusions of law as follows:

I.

Plaintiff is, and was at all times mentioned in the complaint and answer, the owner of the placer mining claim in complaint described.

II.

On or about November 18th, 1903, plaintiff agreed with the defendants orally to allow them to prospect a few days on the said placer mining claim mentioned in plaintiff's complaint with a view of letting defendants have a lay on said premises. After defendants had prospected a few days, and on or about November 20th, 1903, the plaintiff and defendants agreed that defendants might continue working said property on a lay of 25 per cent to the owner and 75 per cent to the defendants. Thereafter and on or about the 11th day of December, 1903, defendants commenced working continuously on said claim with boiler and thawing apparatus, under and in pursuance to said oral agreement, and thereafter continued to work, operate and mine said

property, but without sluicing the same, until on or about the 4th day of March, 1904. Prior to said 4th day of March, 1904, there was no written contract or lease entered into between the plaintiff and defendants in relation to working, mining or operating said property. On or about said 4th day of March, 1904, plaintiff and defendants agreed to reduce said oral lay to writing, and thereupon the defendant Elliott, using a blank form of lease, drew up a lay of said premises, in words and figures in substance as set forth in paragraph II of plaintiff's complaint, save and except that said lay lease then so drawn up by said defendant Elliott, provided for the payment of 25 per cent of the gross output of said claim to plaintiff Stanley Kuzek, lessor, instead of 75 per cent as stated in the lease set forth in paragraph II of plaintiff's complaint. Said lease so drawn up by defendant Elliott, which provided for the payment of 25 per cent of the gross output of said claim to said Stanley Kuzek, instead of 75 per cent, was on said 4th day of March, 1904, actually signed by defendants and plaintiff, and delivered to defendants, and is and was, at all times herein mentioned, the original lease of the said premises, entered into in writing between the parties hereto. At the request of plaintiff said lease was, by the parties, dated back so as to appear to have been entered into and executed on the 5th day of December, 1903, although the same was never drawn up, signed, executed or delivered until on or about said 4th day of March, 1904. After said 4th day of March, 1904, continuously until this action was commenced, and the in-

junction issued herein, said defendants continued to work, mine and operate said mine and mining claim in complaint described, under and pursuant to said original lease aforesaid.

III.

Afterwards, and on or about the 3d day of April, 1904, at the request of said plaintiff, the said defendant Elliott drew up a duplicate of said original lease to be retained by the plaintiff Kuzek; in drawing up said duplicate, defendant Elliott used the same kind of a printed blank as was used by him for said original lease, but in copying and drawing the same said Elliott erroneously and inadvertently wrote in "75 per cent" to be paid to the lessor instead of "25 per cent," which was written in said original lease. Said duplicate of said lease so drawn upon said 3d day of April, 1904, in which said mistake was made as aforesaid, was signed by the plaintiff and defendants, and delivered to said Kuzek, and said duplicate is the document set forth in paragraph II of plaintiff's complaint. In signing and executing said duplicate the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said duplicate to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff.

The mistake made by plaintiff and defendants in copy-

ing and signing said lease was mutual and was inadvertently made by said Elliott in copying said original lease, and was unknown to either the plaintiff or defendants until considerable time afterwards.

Said duplicate lease does not and did not express the true agreement between the parties as set forth in the original agreement entered into between them, but by said mistake and inadvertence aforesaid it was made to appear thereby that the plaintiff lessor was entitled to 75 per cent of the gross output of said claim, whereas in fact the true mutual agreement between the parties was and is that the defendants were and are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent, and it was not intended by drawing up and signing and executing said duplicate lease to change or modify in any particular the original lease in writing entered into between the parties aforesaid.

IV.

Said original lease so signed, entered into and executed by plaintiff and defendants on said 4th day of March, 1904, has been by the defendants inadvertently lost or mislaid, and for that reason they cannot produce the same. Said original lease was, however, in substance the same as the duplicate thereof, set forth in plaintiff's complaint, except that it provided for the payment to the plaintiff Kuzek of 25 per cent instead of 75 per cent of the gross output of said claim. Defendants have made careful and diligent search for said original lease, but are and have been unable to find the same.

V.

On the 23d of May, the defendants having made a cleanup of 54 8-100 ounces of gold from said claim, described in plaintiff's complaint, in company with plaintiff carried the same to the Alaska Banking and Safe Deposit Company's office in Nome, Alaska, for the purpose of having the same assayed and selling the same to said bank and dividing the proceeds between the plaintiff and defendant. After the 23d day of May, 1904, the defendants continued to sluice the dumps of pay gravel on said premises, and on the 28th day of May, 1904, brought into the town of Nome, in company with this plaintiff, 126 69-100 ounces of gold.

VI.

On both said occasions, to wit, the 23d day of May and the 28th day of May, 1904, the plaintiff demanded that the defendants pay and deliver to him 75 per cent of the gross output, and defendants refused to make such a division of the said gold, and refused to pay or deliver to him any greater portion thereof than 25 per cent of said golddust, which amount defendants offered to plaintiff.

VII.

After the commencement of this action, by stipulation of the parties, one Frank Place, was appointed by the court receiver to sluice and extract the gold from the dumps of pay gravel mined from said claim by said defendants Magaha and Elliott, and said receiver thereupon took possession of the same and sluiced said dumps

and cleaned up from the same 1341.90 ounces of gold. Said first lot of gold sluiced from said claim by the defendants amounting 54.08 ounces, was delivered by said defendants to the said Alaska Banking and Safe Deposit Company, and said second lot of gold sluiced from said claim by defendants was by defendants delivered to and accounted for by said receiver in his account. The total amount of gold mined and sluiced from said claim by the defendants and by said receiver amounted to 1522.67 ounces, and by stipulation of the parties one-quarter (¼) of said amount has been paid and delivered to plaintiff, and one-quarter to defendants, and after allowing to said receiver all his expenses and compensation, there now remains 625.67 ounces of golddust and 366 86-100 dollars in cash, which, by the order of the Court, has been deposited with the Alaska Banking and Safe Deposit Company at Nome, Alaska, to await the judgment of the Court in this action.

VIII.

The defendants at all times have fully and faithfully performed all the conditions and covenants of said original lease of the premises in complaint described, entered into and signed on or about March 4th, 1904.

And as to conclusions of law from the foregoing facts, the Court finds that the defendants are entitled to judgment and decree in their favor, adjudging:

First.—That the injunction heretofore granted herein be dissolved.

Second.—That said duplicate lease signed and executed by plaintiff and defendants on or about April 3d, 1904, be corrected and reformed by changing the words "75 per cent" therein, to "25 per cent."

Third.—That the defendants were and are the owners of, and entitled under their original lease of said premises, and under said duplicate as thus reformed and corrected to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent, and that defendants are entitled to have paid and deliered to them the balance of 625.67 ounces of gold, and 366.86/100 dollars in money, now on deposit with the Alaska Banking and Safe Deposit Company.

Fourth.—That defendants are entitled to judgment against plaintiff, for their costs and disbursements.

Let judgment and decree be entered accordingly.

Done in open court this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the District Court, District of Alaska, Second Division.

[Endorsed]: Filed July 30th, 1904. Geo. V. Borchsenius, Clerk. By J. H. Dunn, Deputy Clerk.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHARLES F. MAGAHA, and WILLIAM ELLIOTT,
Defendants.

Decree.

The above-entitled cause having been tried at the last special term of the above-entitled court, which was begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April, 1904, and having being argued by counsel and submitted to the Court for decision and the Court afterwards on the 30th day of July, 1904, at the next special term of said court which was begun and holden at said Nome aforesaid, commencing on the 18th day of July, 1904, having decided said cause and made, signed and filed herein its findings of fact and conclusions of law, and ordered judgment and decree to be entered in accordance therewith—

Now, therefore, by virtue of the law and the premises aforesaid, it is by the Court now ordered, adjudged and decreed, as follows, to wit:

First.—That the injunction heretofore issued herein be and the same is hereby dissolved.

Second.—That the duplicate lease being the instrument set forth in paragraph II of plaintiff's complaint,

dated December 5th, 1903, which was signed and executed by the plaintiff and defendants on or about April 3d, 1904, be and the same is hereby corrected and reformed by changing the words "75 per cent" therein, to "25 per cent."

Third.—That the defendants were and are the owners of and entitled, under their original lease of the premises in the complaint described, and under said duplicate lease as thus corrected and reformed to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent thereof.

Fourth.—That the Alaska Banking and Safe Deposit Company pay over and deliver to defendants the balance of the gold and proceeds thereof extracted from said claim by the receiver, now on deposit with said company, amounting to 625.67 ounces of gold and 366 86/100 dollars in money.

Fifth.—That defendants have and recover from plaintiff their costs and disbursements incurred herein amounting to ——— dollars.

Done in open court at Nome, Alaska, this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the United States District Court, District of Alaska, Second Division.

[Endorsed]: Filed July 30th, 1904. Geo. V. Borchsenius, Clerk. By J. H. Dunn, Deputy Clerk.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHARLES F. MAGAHA, and WILLIAM ELLIOTT,

Defendants.

Motion for New Trial.

Now comes the plaintiff by A. J. Bruner and Elwood Bruner, his attorneys, and asks that the Court grant a new trial of this cause, for the following reasons, viz.:

I.

Insufficiency of the evidence to justify the verdict or other decision, and that the said decision is against law.

II.

Errors in law occurring at the trial and excepted to by the plaintiff, and in particular the plaintiff states the following reasons:

a. The Court erred in admitting evidence concerning the negotiations which led up to the reduction of the contract to writing.

b. The Court erred in admitting evidence in contradiction of the verified answer of the defendants.

c. The Court erred in admitting evidence of such a contract as set forth in the complaint, in the vicinity of the claim described in the complaint.

d. The Court erred in the admission of oral evidence as to the contents of what is known as the pencil copy of the original agreement.

e. The Court erred in the admission of any evidence to contradict the written terms of the instrument introduced by plaintiff, and known as and admitted as the copy of copy or duplicate of the original instrument.

f. The Court erred in giving its opinion in said cause.

g. The Court erred in dissolving the injunction in favor of the plaintiff heretofore granted.

h. The Court erred in the admission of oral evidence of the original agreement.

i The Court erred in rendering judgment for defendants.

A. J. BRUNER and
ELWOOD BRUNER,
Attorneys for Plaintiff.

Service of the above by copy admitted this 1st day of August, 1904.

J. L. McGINN,
IRA D. ORTON,
Attorneys for Defendants.

[Endorsed]: Filed Aug. 1, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,
vs.
CHARLES F. MAGAHA et al.
No. 1122.

Order Overruling Motion for New Trial.

This cause having been heretofore argued and submitted to the Court on a motion for a new trial made therein, and the Court having carefully considered the same, does now—

Order that said motion be, and the same is hereby, overruled.

Nome, Alaska, September 19th, 1904.

ALFRED S. MOORE,
District Judge.

Service of the foregoing proposed bill of exceptions by copy is hereby admitted this 5th day of October, 1904.

IRA D. ORTON,
Attorney for Defendants.

In the United States District Court for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHARLES F. MAGAHA, and WILLIAM ELLIOTT,
Defendants.

Stipulation as to Bill of Exceptions.

It is hereby stipulated by and between counsel for plaintiff and counsel for the defendants in the above-entitled cause that the above bill of exceptions is served, filed, presented and allowed in due time.

Done at Nome, Alaska, this 15th day of June, A. D. 1905.

A. J. BRUNER, and
ELWOOD BRUNER,
Attorneys for Plaintiff.

IRA D. ORTON,
Attorney for Defendants.

And now in furtherance of justice, and that right may be done the plaintiff presents the foregoing as his bill of exceptions in this cause and prays that the same may be settled and allowed, and signed, and certified by the Judge, as provided by law.

A. J. BRUNER,
ELWOOD BRUNER,
Attorneys for Plaintiff.

And now upon motion of counsel for the plaintiff, it is ordered and decreed that the foregoing bill of exceptions be, and the same is hereby, approved, allowed and settled, and made a part of the record herein.

Done in open court this 15th day of June, A. D. 1905.

ALFRED S. MOORE,
District Judge.

[Endorsed]: No. 1122. District Court, United States, District of Alaska, Second Division. Stanley Kuzek, vs. Chas. F. Magaha et al. Bill of Exceptions. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. Oct. 5, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. A. J. Bruner and Elwood Bruner, Attorneys for Plaintiff. Refiled in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. June 15, 1905. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. McB.

In the United States District Court, in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

Petition for Appeal in Equity and Order Allowing Same.

Comes now Stanley Kuzek, the plaintiff in the above-entitled action, and conceiving himself aggrieved by the judgment and decree made and entered in said cause on the 30th day of July, A. D. 1904, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. The following is a copy of the judgment and decree appealed from:

"In the United States District Court, for the District of Alaska, Second Division.

STANLEY KUZEK,

Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Defendants.

The above-entitled cause having been tried at the last special term of the above-entitled court, which was begun and holden at the town of Nome, District of Alaska, commencing on the 25th day of April, 1904, and having been argued by counsel and submitted to the Court for decision, and the Court afterwards, on the 30th day of July, 1904, at the next special term of said court which was begun and holden at said Nome aforesaid, commencing on the 18th day of July, 1904, having decided said cause, and made, signed and filed herein its findings of fact and conclusions of law, and ordered judgment and decree to be entered in accordance therewith;

Now, therefore, by virtue of the law and the premises aforesaid, it is by the Court now ordered, adjudged and decreed, as follows, to wit:

First.—That the injunction heretofore issued herein be, and the same is hereby, dissolved.

Second.—That the duplicate lease being the instrument set forth in paragraph II of plaintiff's complaint, dated December 5th, 1903, which was signed and executed by the plaintiff and defendants on or about April

3d, 1904, be, and the same is hereby, corrected and reformed by changing the word "75 per cent" therein to "25 per cent."

Third.—That the defendants were and are the owners of and entitled, under their original lease of the premises in the complaint described, and under said duplicate lease as thus corrected and reformed to 75 per cent of the gross amount of gold extracted by them from the premises described in plaintiff's complaint, and plaintiff to 25 per cent thereof.

Fourth.—That the Alaska Banking and Safe Deposit Company pay over and deliver to defendants the balance of the gold and proceeds thereof extracted from said claim by the receiver now on deposit with said company, amounting to 625.67 ounces of gold and 366 86-100 dollars in money.

Fifth.—That defendants have and recover from plaintiff their costs and disbursements incurred herein, amounting to ——— dollars.

Done in open court at Nome, Alaska, this 30th day of July, 1904.

ALFRED S. MOORE,

Judge of the United States District Court, District of Alaska, Second Division.

Filed in the office of the clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. July 30th, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk."

Done in open court this 15th day of June, A D. 1905.

A. J. BRUNER and
ELWOOD BRUNER,
Attorneys for Plaintiff.

Service of a true copy of the above petition is hereby accepted this 15th day of June, A. D. 1905.

IRA D. ORTON,
Attorney for Defendants.

Order Allowing Appeal.

The foregoing petition is hereby granted, and it is ordered that the appeal mentioned therein be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of $2,500, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Done at Nome this 15th day of June, A. D. 1905.

ALFRED S. MOORE,
District Judge.

In the United States District Court, in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

Assignment of Errors.

Comes now the complainant in the above-entitled cause, and filed the following assignment of errors, upon which he will rely upon his appeal from the decree made by this Honorable Court, on the 30th day of July A. D. 1905, in the above-entitled cause.

I.

The Court erred in permitting the witness Elliott, over plaintiff's objection, to testify that he had showed the original agreement, from which the witness testified that he had copied the duplicate to Mr. Taylor, Mr. Cowden, Mr. Strelke, Judge Reed and other persons.

II.

The Court erred in permitting the witness Magaha, called on behalf of the defendants, to testify against the objections of plaintiff as to what the wording of the original lease was.

III.

The Court erred in permitting D. M. Taylor, called on

behalf of defendants, to testify against the objection of plaintiff as to what royalty the original lease provided.

IV.

The Court erred in permitting the witness Cowden, called on behalf of defendants, to testify against the objections of plaintiff as to his reason for examining the lease, submitted to him by the defendants.

V.

The Court erred in permitting the witness Taylor, over plaintiff's objection, to testify as to a conversation between himself and the plaintiff and defendants as to the terms of the lease, which conversation was held prior to the reduction of the lease to writing.

VI.

The Court erred in permitting the witness D. M. Taylor to answer the following questions, the same having been objected to by plaintiff:

"Q. Are you familiar with the amount of royalty which is usually paid or reserved by the lessor and lessee upon claims of the character and description as found on the Marion Bench Claim?"

To which question the witness replied:

"A. I am."

"Q. I will ask you if you are acquainted with the range of percentage which was paid to the lessor upon ground of the character and description of the Marion Bench Claim during the past year or two years?"

To which the witness replied:

"A. I am."

"Q. I will ask you to state what that percentage is or was during that period?"

To which the witness replied:

"A. Twenty-five per cent was paid to the lessor—I could not say—I know of a great number."

"Q. I will ask you to state what is the highest percentage you have ever known to be paid on ground of a similar nature as that of the Marion Bench Claim?"

To which the witness replied:

"A. The highest percentage I know to have been paid on ground similar to this along the Beach line is 25 per cent to the lessor."

VII.

The Court erred in permitting the witness C. G. Cowden, over the objections of plaintiff, to testify as to the usual rate of royalty that is to be paid upon mines at and near Peluk creek, of the same kind and character as the Marion Bench claim.

VIII.

The Court erred in permitting the witness G. W. Marsh to testify as to a conversation held by him with the plaintiff concerning the terms of the lease, which conversation occurred prior to the reduction of the lease of plaintiff to defendants to writing.

IX.

The Court erred in permitting the witness G. W. March and Thomas Jacobs to testify as to the usual

amount of royalty paid on claims situated in the vicinity of the claim in dispute.

X.

The Court erred in permitting the witness John Greve to testify as to the conversation held with the plaintiff concerning the terms of the lease between plaintiff and defendants, which conversation was held more than three months prior to the time when the lease was reduced to writing.

XI.

The Court erred in permitting the witness T. M. Reed to testify as to the reason why the defendants Magaha and Elliott and C. G. Cowden and D. M. Taylor brought the original lease to him.

XII.

The Court erred in permitting the defendant Elliott to testify as to a conversation held between himself, D M. Taylor, and the plaintiff as to the terms of the lease, which conversation was held before the contract of lease was reduced to writing.

XIII.

The Court erred in denying and overruling the plaintiff Kuzek's motion for a new trial.

XIV.

The Court erred in rendering a decree that the injunction heretofore issued in this cause be, and the same is hereby, dissolved.

XV.

The Court erred in rendering a decree that Plaintiff's Exhibit No. 2 be reformed by striking out the figure "75" in paragraph 4 thereof, and answering in lieu thereof the figures "25."

XVI.

The Court erred in rendering a decree in favor of defendants Chas. F. Magaha and William Elliott, and against the plaintiff Stanley Kuzek.

XVII.

The Court erred in not making, rendering and entering a decree in favor of the said plaintiff Stanley Kuzek, and against the defendants Chas. F. Magaha and Wm. Elliott, adjudging that plaintiff was entitled to an accounting of the gold extracted by defendants, and that plaintiff required 75 per cent of the gross proceeds of gold taken by defendants from the premises described in plaintiff's complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainants present the same to the Court, and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and complainants pray a reversal of the decree be made and entered by said Court.

A. J. BRUNER,

ELWOOD BRUNER,

Attorneys for Plaintiff.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Petition for Appeal in Equity and Assignment of Errors. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska, June 15, 1905. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. Vol. 3, Orders and Judgments, page 322. A. J. Bruner and Elwood Bruner, Attorneys for Plaintiff.

In the United States District Court in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

Bond on Appeal.

Know all men by these presents, that we, Stanley Kuzek, as principal, and D. W. McKay and H. B. Ames, as sureties, are held and firmly bound unto Chas. F. Magaha and Wm. Elliott in the full and just sum of two thousand five hundred dollars, to be paid to the

said Chas. F. Magaha and Wm. Elliott, his attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of June, A. D. 1905.

The condition of this obligation is such, nevertheless, that whereas lately at a session of the District Court of the United States, in and for the District of Alaska, Second Division thereof, held in the town of Nome, in said district, in a suit pending in said court between the said Stanley Kuzek, plaintiff, and Chas. F. Magaha and Wm. Elliott, defendants, a decree was rendered against the said Stanley Kuzek; and the said Stanley Kuzek having obtained from said United States District Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree of the aforesaid suit, and a citation directed to the said named defendants is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California.

Now, the condition of the above obligation is such, that if the said plaintiff on appeal shall prosecute his said appeal to effect, and answer all damages and costs

that may be awarded against him, if he fails to make his appeal good, then this obligation to be void; otherwise to remain in full force and virtue.

STANLEY KUZEK, [Seal]
Principal.

D. W. McKAY. [Seal]

H. B. AMES. [Seal]

_____. [Seal]

Executed in the presence of:

G. J. LOMEN.

O. K.—IRA D. ORTON.

United States of America,
District of Alaska. } ss.

D. W. McKay and H. B. Ames, being first duly sworn, each for himself deposes and says:

That he is the identical person who signed, subscribed and executed the foregoing bond as surety thereon; that he is a resident of the District of Alaska; that he is not an attorney, counselor at law, marshal or deputy marshal, commissioner or clerk of any court, or other officer of any court; that he is worth the sum of $2,500.00 over and above all debts and liabilities and exclusive of property exempt from execution.

D. W. McKAY.

H. B. AMES.

Subscribed in my presence and sworn to before me this 19th day of June, A. D. 1905.

[Notarial Seal] G. J. LOMEN,

Notary Public in and for the District of Alaska.

The foregoing bond is hereby approved this 21st day of June, A. D. 1905.

ALFRED S. MOORE,

United States District Judge.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Bond on Appeal. Filed in the Office of the Clerk of the United States District Court, Alaska, Second Division, at Nome, Alaska. Jun. 21, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. L. Civil Bonds No. 3, page 104. A. J. Bruner, Attorney for Plaintiff.

In the United States Circuit Court of Appeals for the Ninth Circuit.

STANLEY KUZEK,

Appellant,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,

Respondents.

Stipulation Enlarging Time to File Transcript.

It is hereby stipulated by and between the above-named parties, appellant and respondents that the time for the petitioners in error to file the transcript of the record and to docket the above-entitled cause on appeal with the clerk of the Circuit Court of Appeals for the Ninth Circuit, may be enlarged to and including the 16th day of August, 1905.

Dated at Nome, Alaska, this 11th day of July A. D. 1905.

A. J. BRUNER,
Attorney for Appellant.

IRA D. ORTON,
Attorney for Respondent.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondents. Stipulation. A. J. Bruner, Attorney for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

STANLEY KUZEK,
Appellant,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Respondents.

Order Enlarging Time to File Transcript.

Now at this day comes the appellant by A. J. Bruner, Esq., of counsel, and upon the written stipulation of counsel, for the appellant and respondents, and thereupon this cause coming on to be heard upon the motion of said stipulation for the extension of time in which to file the transcript herein, in the United States Circuit Court of Appeals for the Ninth Circuit it is ordered that the time heretofore granted in which to file said transcript in said United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to August 16th, 1905.

ALFRED S. MOORE,
Judge of the District Court, for the District of Alaska, Second Division.

[Endorsed]: No. 1122. In the United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Respondent Order Enlarging Time to File Transcript. A. J. Bruner, Attorney for Appellant.

In the District Court in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,
vs.
CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.
No. 1122.

Clerk's Certificate to Transcript.

I, Geo. V. Borchsenius, clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 174, both inclusive, is a true and exact transcript of the complaint, summons, answer, amendments to complaint, reply, bill of exceptions, petition for appeal, order allowing appeal and assignment of errors, bond on appeal, order extending time to docket transcript, in the case of Stanley Kuzek vs. Chas. F. Magaha and Wm. Elliott, Number 1122, this court and of the whole thereof as appears from the records and files in my office at Nome, Alaska; and further certify that the original citation in the above-entitled cause is attached to this transcript.

Cost of transcript $52.70, paid by A. J. Bruner, attorney for plaintiff.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of July, A. D. 1905.

[Seal] GEO. V. BORCHSENIUS,
Clerk.

By Angus McBride,
Deputy Clerk.

In the United States District Court, in and for the District of Alaska, Second Division.

STANLEY KUZEK,
Plaintiff,

vs.

CHAS. F. MAGAHA and WM. ELLIOTT,
Defendants.

Citation.

United States of America—ss.

The President of the United States of America, to Chas. F. Magaha and Wm. Elliott, the Defendants Above Named, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California,

within 30 days from the date of this writ pursuant to an appeal filed in the clerk's office of the District Court of the United States, for the District of Alaska, Second Division, wherein Stanley Kuzek is plaintiff and Chas. F. Magaha and Wm. Elliott are defendants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 22d day of June, A. D. 1905, and of the independence of the United States, the 129th.

ALFRED S. MOORE,
United States District Judge for the Second Division of the District of Alaska.

[Seal] Attest: GEO. V. BORCHSENIUS,
Clerk.

By Angus McBride,
Deputy Clerk.

Personal service of the foregoing citation is hereby admitted at Nome, Alaska, this 22 day of June, A. D. 1905.

IRA D. ORTON,
Attorney for Defendants Chas. F. Magaha and Wm. Elliott.

[Endorsed]: No. 1122. United States District Court, District of Alaska, Second Division. Stanley Kuzek, Plaintiff, vs. Chas. F. Magaha and Wm. Elliott, Defendants. Citation. Filed in the office of the Clerk of

the District Court of Alaska, Second Division, Nome, Alaska, June —, 1905, Geo. V. Borchsenius, Clerk. By ————————, Deputy Clerk.

[Endorsed]: No. 1220. United States Circuit Court of Appeals for the Ninth Circuit. Stanley Kuzek, Appellant, vs. Chas. F. Magaha and Wm. Elliott, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed July 24, 1905.

F. D. MONCKTON,
Clerk.

No. 1220.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,

Appellant,

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,

Appellees.

APPELLANT'S BRIEF.

CHARLES PAGE,
E. J. MCCUTCHEN,
SAMUEL KNIGHT,
Counsel for Appellant.

Pernau Press.

No.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,
Appellant,

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,
Appellees.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This action was brought by Stanley Kuzek in the District Court for the Second Division of the District of Alaska, to recover rent or royalty claimed to be due him as lessor of a certain mine, the Marion Bench Claim, near Nome from appellees as lessees thereof, in accordance with the terms of a written lease set forth in the complaint. This agreement as pleaded provided that the lessees should

> "pay the said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904" (trans. p. 5).

The prayer of the complaint also asked for an accounting and provisional relief *pendente lite*.

The answer denies that the lease thus pleaded correctly sets forth the agreement of the parties thereto respecting the percentage of gross output payable to the lessor, and avers that one of the appellees, in preparing the duplicate original thereof for appellant,

> "erroneously wrote in the words '75 per cent' to be paid the lessor, instead of '25 per cent' which was written in said original lease", and "that in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff. That the mistake made by plaintiff and defendants in copying and signing said lease was mutual, and was inadvertently made by the defendant Elliott in copying said original lease, and was not known to either the plaintiff or defendants until considerable time afterwards. That said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them, but by said mistake and inadvertence aforesaid, it was made to appear thereby that the plaintiff, lessor, was entitled to 75 per cent of the gross output of said claim,

whereas and in fact the true mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent. That it was not intended by drawing up and signing and executing said copy or duplicate lease to change or modify in any particular the original lease in writing, entered into between the parties aforesaid'' (trans. p. 17).

I.

POINTS AND AUTHORITIES.

AN EQUITABLE DEFENSE SEEKING THE REFORMATION OF THE LEASE WAS IMPROPERLY PLEADED IN THE CASE AT BAR.

The court will note at the outset that the answer tenders an equitable defense in an action at law. Respecting this point, errors are assigned by appellant based, *inter alia,* upon the admission of testimony tending to show that a lost original was shown to various persons, and that its wording differed as respects the amount of royalty from the wording of the subsequent original pleaded and offered in evidence by appellant, and upon other testimony whereby appellees sought the reformation of the contract (trans. pp. 201-205), as well as upon the court's action in decreeing such reformation. It appears that objection was made in appellant's behalf during the trial and overruled to evidence offered by appellees tending to show their loss of the other duplicate original of the contract and its examination before such loss by various persons and the grounds of such objection were that it was irrelevant,

immaterial and incompetent, *i. e.,* not within the proper issues of the case (trans. pp. 42-43); and subsequent objections on like and further grounds were made to evidence offered of a variance between the lost instrument and that pleaded by appellant in evidence (trans. pp. 47-48, 65, 67-68, etc.). It will be further noted that

> "it was thereupon agreed by counsel and the Court that each and every ruling of the Court during the trial of the case should be deemed duly excepted to" (trans. p. 42).

Even if, however, no error was specially assigned in the court below based upon the interposition of this defense in an action of a legal character,

> "the court at its option may notice a plain error not assigned",

Rule 11, Circuit Court Appeals, 9th Circuit.

An assignment of error is not necessary to give the court on appeal authority to notice a plain error,

U. S. v. Tennessee etc. R. Co., 176 U. S. 242;

and we believe the tendency of the court is towards liberality in noticing plain errors in the record though unassigned in the court below. The error we now complain of is, we submit, patent on its face and calls for correction; for the court will observe that this is not an action for the recovery of real property or the possession thereof and appellees do not seek to justify their possession by means of an equitable title. Had the action been of that character, such a defense would have been allowable.

Code of Civil Procedure of Alaska, sec. 361.

The suit, however, was brought to recover money claimed to be due the lessor under a lay or lease; and in the absence of any statute to the contrary no equitable defense would lie thereto. If appellees desired a reformation of the lease in any respect such relief could only be obtained by a bill in equity filed on their behalf, not by an answer in a common law suit. In the case of

Shields v. Mongallon Exploration Co. et al., 137 Fed 539, 546-548,

which was an action of ejectment, where

> "the plaintiff in error does not and did not in the court below question the power of the trial court to deal with the equitable defense which was interposed in the present case, nor its power to proceed and decree the affirmative relief which was accorded in ordering the reformation of the deed",

this court discussed the character of the defense there interposed; and the conclusion is irresistible that it is only in cases of the nature especially provided for in the section of the Alaskan Code just referred to that an equitable defense will lie. The court said:

> "Under the system which prevails in the Circuit Courts of the United States, if a defendant, after being brought into a court of law to answer the plaintiff's complaint, discovers that his defense lies in a reformation of his written contract or deed, his remedy is to file a bill in equity praying for such reformation, and for an injunction against the prosecution of the law action until a decision of the suit in equity. The Alaskan Code (31 Stat. 393, c. 38), making certain provisions for actions of an equitable nature, contains the proviso: 'This section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title.'

> This provision was adopted from the laws of Oregon (B. & C. Comp. sec. 392), after it had been held in that State that the equitable defense so allowed to be pleaded could be used only for the purpose of defending possession, and not for the purpose of obtaining affirmative relief. *Spaur v. McBee,* 19 Or. 76, 23 Pac. 818."

We respectfully submit that the error in this respect committed by appellees in the court below is so palpable that we feel justified in asking the court to notice it, even in the absence of a specific assignment thereof.

Further criticism may properly be made of the answer for its failure to separate the strictly defensive portion of its allegations from that part which purports to set forth new matter constituting the counterclaim sought to be established upon which affirmative relief was asked and granted.

II.

THE EVIDENCE, AND ERRORS IN ADMITTING SOME OF IT, PRINCIPALLY RELATING TO CONVERSATIONS AND CUSTOMS.

Reformation of the lease or lay agreement was sought by appellees on the ground of an alleged mutual mistake of both parties to the contract (trans. pp. 16-17). We contend that, even if proper issues were tendered by the answer to the complaint, the evidence is insufficient to warrant the relief granted and that therefore the decree of the court below should be reversed. It will be of interest, therefore, to note what evidence ap-

pellees introduced to support their contention; and in stating this evidence we shall briefly comment upon some errors made by the court below and properly assigned here, in allowing witnesses to testify as to the existence of alleged conversations and mining customs which did not in any way tend to throw light upon the written agreement made by the parties thereto. The errors to which we shall shortly advert were material and prejudicial to the rights of appellant, for it must be presumed that the trial court relied wholly or partially upon the testimony thus introduced in reaching its conclusion. The Supreme Court of the United States has said that errors in the reception of evidence will be held material where it does not appear beyond doubt that they could not prejudice the rights of the parties against whom the evidence was received.

Mexia et al. v. Oliver, 148 U. S. 664.

And no presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

U. S. v. Wilkinson et al., 12 How. 246.

In this connection the court will bear in mind that

> "on an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided."

Ridings et al. v. Johnson et al., 128 U. S. 212;

Central Trust Co. v. Seasongood, 130 U. S. 482;

an appeal in equity bringing up all matters decided in the court below to appellant's prejudice.

Buckingham et al. v. McLean, 13 How. 150.

We may properly assume that the bill of exceptions includes all of the evidence, although it does not expressly so state, if the entries sufficiently show that all of the evidence is included.

Gunnison County v. Rollins et al., 173 U. S. 255;

and

> "no evidence can be looked into in this Court, which exercises an appellate jurisdiction, that was not before the Circuit Court; and the evidence certified with the record must be considered here as the only evidence before the Court below."
>
> *Holmes et al. v. Trout et al.,* 7 Peters 171.

One of the appellees, William Elliott, testified that he and his co-appellee Charles F. Magaha signed the duplicate original lease pleaded and offered by appellant in evidence, and that it was written out by this witness about April 4th, a month after the first original had been signed by the same parties thereto (trans. p. 41). According to his testimony, he wrote out both instruments himself (trans. p. 42) and showed the earlier one to one Taylor, who took it to one Cowden; the latter also examining it. Taylor retained possession of it three or four days and it was afterwards left with Judge Reed. The witness next saw the paper when he got it from one English and he also claimed to have exhibited the document to one Fred Strelke (trans. p. 53).

> "On the 1st of April, I took it down to the claim, and put it in a box we had to put papers in; it remained there possibly four or five days, when I took it to draw up the duplicate which is now before me. After the duplicate was drawn up I put the original lease in the box again, where it re-

> mained until the 7th or 8th of April, when I turned it over to my partner, Magaha, since which time I have never seen it. Since then I have searched for it in Magaha's cabin here, and at the house on the claim; I have made inquiry since, but have never heard of it. Mr. Magaha put it in his inside pocket, and left for Nome; I have never seen it since'' (trans. p. 44).

Elliott further testified that he had the first original before him when he prepared in his own handwriting the duplicate original and made a mistake, *''an oversight''*, as he termed it, in copying the terms of the lay (trans. pp. 47-48). Before the first original had been drawn a draft of the agreement had been prepared which was afterwards offered in evidence (trans. p. 59) and which had been partially written out by this witness (trans. pp. 54-55, 59, 62-64). This draft sustains appellant's contention, *making the same provision as the duplicate offered in evidence respecting the seventy-five per cent royalty payable to the lessor.*

In

2 Pomeroy's Equity, 2d ed., sec. 859,

the learned author says that an ancillary document, such as the draft of an instrument sought to be reformed, is of great aid to the court, but in its absence relief *may* be granted by parol evidence; and Judge Story says that a preliminary instrument exerts a controlling effect upon a subsequent agreement where reformation of the latter is desired, antecedent parol negotiations being merged in the written contract.

1 Story's Equity, 10th ed., sec. 160;

1 Duer on Insurance, p. 71;

Collett v. Morrison, 9 Hare 162;
Phoenix Fire Ins. Co. v. Gurnee, 1 Paige Ch. 278;
Van Tuyl et al. v. Westchester Fire Ins. Co., 55 N. Y. 657;
Wyche et al. v. Greene, 11 Ga. 159;
Delaware Ins. Co. v. Hogan, Fed. Cas. No. 3765;
Oliver v. Mutual etc. Ins. Co., Fed. Cas. No. 10,498.

In the case of

Equitable Ins. Co. v. Hearne, 20 Wall. 494,

where reformation of a contract was sought in order to make it conform to the agreement contained in preliminary correspondence between the parties, the court observed:

> "It is not denied that the correspondence constituted a preliminary agreement. Such, clearly, was its effect. The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny, and, if it were necessary, threw him off his guard."

If appellees were here seeking reformation of a lease which did *not* conform to the terms of the preliminary draft of the agreement, this, with many other cases, would be ample authority to insure the success of their contention.

Elliott was asked on cross examination:

> "Was the duplicate in the same words that the original was in except the word '75', the figures '75'?

to which he answered,

> "Well, I could not say that hardly; there might be a difference; it was a mistake in putting down 75 per cent to the lessor, I always thought so."

And he further testified as follows:

> "Q. With that exception, in your opinion, it is an exact copy?
>
> A. As far as I can recollect, it is, and still there may be a word there that was not written at all.
>
> Q. It was your intention to make an exact copy, was it not?
>
> A. Of the original, yes, sir, what I claim to be the original, the first one I drew up.
>
> Q. I want to ask you again, although you have already answered, did you or did you not use the original at the time you made this duplicate?
>
> A. *I used the original, I took it there to their house for that purpose, but in regards to reading it or using it, I can't swear I did, I thought I was familiar with it.*
>
> Q. You don't know whether it was used at all?
>
> A. I may have referred to it, I might have, although I knew the dates.
>
> Q. I am asking you the question, whether or not you used the original to your best recollection?
>
> A. *I tell you the original laid there for that purpose.*
>
> Q. That is not an answer to my question.
>
> A. I don't know whether I used it or not.
>
> Q. What is your best recollection about it?
>
> A. That is it.
>
> Q. Your best recollection then is that you did or did not?
>
> A. I am not positive.

Q. Which way do you think it was?

A. I am not positive, to the best of my recollection I don't know which way it was, whether I used it or not.

Q. You may or may not?

A. Yes.

Q. You were asked for a duplicate?

A. Yes, sir.

Q. You drew this up for them to sign as a duplicate?

A. I did.

Q. You didn't care whether it was an exact copy or not?

A. I certainly did.

Q. You didn't compare it with the original?

A. *I made a thousand mistakes in my time where I suffered afterwards.*

Q. Did you do it?

A. I can't say as to that.

Q. Then you might have compared it; then it might have been compared?

A. It might or might not, that is, in comparing the two I might have used it or might not'' (trans. pp. 56, 57-58).

This witness does not recollect whether or not the draft on which these instruments were based and which provided for the payment of the same royalty to appellant as did the duplicate original in his possession, was read over at the time of preparing therefrom the first original. He says:

''There was some reading done before it was all wrote; I couldn't recollect whether it was read over two or three times or not; I know about what took place, I am satisfied in my own mind that it was not read over. *I know that it was handed around to see if it was all right,* I had to take it to town and get there by 2 o'clock, and it was after 2 o'clock, or close to 2 o'clock, before I started;

> Mr. Kuzek did not ask for a duplicate; I told him 'I will make another one out tomorrow when I come down', he says 'all right'; on April the 4th he seemed to be pretty insistent to get the duplicate; on that night right after supper he wanted it signed; I told him I would fix it up tomorrow; that I preferred to fix it the next day; and he said he wanted it right then; and I said 'all right, I will do the best I can at it' " (trans. p. 60).

Apparently Mr. Kuzek ominously feared that some change might be made in or mishap befall the paper and he wished to be protected, but his precaution was of no avail apparently; and like precaution never can be of any avail if contracts can be changed under the guise of reformation upon such evidence as that offered in the case at bar.

The witness admitted that he wrote the entire duplicate original except the signatures (trans. p. 60). His further cross examination upon this point is instructive.

> "Q. It" (the lay agreement produced by plaintiff) "says here 'To pay to said lessor or his legal representatives or assigns 75 per cent'?
>
> A. I see that.
>
> Q. It says to pay to 'his' legal representatives or assigns 75?
>
> A. I see.
>
> Q. You understand the meaning of the word 'lessor'?
>
> A. I don't know as I may have then. I certainly know it now.
>
> Q. Did you at that time?
>
> A. I think I did, yes.
>
> Q. You have been a mining man?
>
> A. I have been a mining man around where they never use anything of that kind.
>
> Q. You didn't have to have occasion to use it to know what that means?

A. I know what it means.

Q. You knew what it meant at the time, did you?

A. I did, yes, sir.

Q. And when you put in the 75 per cent in there, you knew that you were giving it to the lessor, didn't you?

A. Seventy-five; that was my mistake.

Q. You knew that you were giving it to the lessor?

A. I didn't know I was giving him 75 per cent.

Q. You were giving to the lessor or 'his' not 'their' legal representatives?

A. I understand that.

Q. You didn't know that you were giving the lessor 75 per cent?

A. *I might have been thinking of something else when I was writing.*

Q. *You might have been careless?*

A. *I might have been so.*

Q. *You think you were careless, don't you, when you wrote that?*

A. *I know I was.*

Q. *You know you was?*'' (trans. pp. 60-62).

His co-appellee Magaha testified that he signed appellant's duplicate lease April 4th and

> ''another paper of similar import to this a month previous'' (trans. p. 45).

Elliott gave the latter paper to him April 7th or 8th and he lost it (trans. p. 46). His recollection as to the wording of the provision respecting the royalty in the first original agreement is not clear. Upon his direct examination he was asked and testified, in part, as follows:

> ''Q. I call your attention to paragraph marked 4, which reads: 'To pay to the said lessor his legal ' representatives or assigns 75 per cent of the gross

' output of said claim', etc., and I ask you to state if you can, what was the wording of the original lease in that paragraph?

Mr. BRUNER: Objected to the question as irrelevant, immaterial and incompetent, and not the best evidence.

The COURT: The objection overruled.

A. Well, to my best remembrance, it read, 25 per cent to the owner, and 75 per cent to Mr. Elliott and myself. I can't say whether the words '75' in the original lease was in writing or figures or both, but the figures were there, 25; but I couldn't swear that the writing and figures both were there; I signed the duplicate in the morning at the breakfast table at Mr. Kuzek's residence on Marion Bench; Elliott, Mrs. Kuzek and Kuzek had already signed it; I think Mr. and Mrs. Kuzek were both there at the time.

Upon cross examination he said:

When I signed the duplicate, there was only one paper present at the time; *I didn't read it over; they shoved it up to me and I signed it; Billy* (his co-appellee, Elliott) *told me in the morning that it was all right; all I had got to do was to sign it, it was made out the night before.*

Q. *You relied entirely upon the statements of your partner as to the terms of this lease?*

A. *I did, if I hadn't I should have read it over, but I didn't read it over.*

Q. *There were no representations to you by Mr. and Mrs. Kuzek in regard as to whether it was a true copy or not?*

Mr. ORTON: Objected to as immaterial, irrelevant and incompetent.

Mr. A. J. BRUNER: We are trying to find out what took place.

The COURT: Objection overruled.

A. *No, sir. I am positive that I didn't read the paper over at all before signing it;* I made no comparison between the duplicate and the original; the

> original was not there at the time; nor was the pencil copy there; I did not read the duplicate aloud, nor did Mr. or Mrs. Kuzek read the paper aloud, at that time; there was no comparison made between that paper and the pencil memorandum; I am almost positive I signed the duplicate at the breakfast table, and not in the sleeping-room adjoining it; I did not have the original paper in their house at that time; I made no comparison whatever, nor did Mr. or Mrs. Kuzek in my presence at that time read the copy to me or make any comparison between the duplicate and the original or the pencil copy. I could not say whether I used the same pen and ink as the others'' (trans. 65-67).

D. M. Taylor testified for appellees that the first original provided for a 25 per cent royalty to the lessor (trans. p. 68), and Fred Strehlke said:

> ''I read the paper at that time; I do not remember the date of it; I don't know by whom it was signed; I never paid much attention to it; several names were signed but I only noticed one, Mr. Elliott's; there was a name signed as a witness, but I didn't notice who it was; it referred to the Marion Bench Claim; it provided for the payment of 25 per cent royalty to the lessor; I read the lease over'' (trans. p. 68).

C. G. Cowden also testified on behalf of appellees that the first original merely gave to the lessor 25 per cent royalty (trans. pp. 69-70), the court erroneously, in our opinion, allowing him upon his direct examination to give his reasons for examining the paper. Upon his cross examination he admits that

> ''What I have stated is merely to the best of my recollection, after an examination; I am not

willing to positively swear that the words were so and so'' (trans. p. 70).

Thereafter a number of witnesses were called and recalled on appellees' behalf for the purpose of showing that appellant had admitted he was receiving only 25 per cent royalty, and for the further purpose of showing what was the customary royalty for mines in the neighborhood of the Marion Bench Claim. Many of these alleged conversations took place *some time prior* to the date of the first original agreement made in March and some are alleged to have occurred *between the time when the first and the time when the duplicate agreements* were prepared and executed. For instance, Taylor, when recalled, was, under objection made by appellant's counsel which fully state the grounds thereof (trans. pp. 71-73), and are made the subject of the fifth assignment of error (trans. p. 202), allowed to testify to a conversation which he claims took place before the first original lease was prepared, wherein some one said,

> '' 'Here is Mr. Kuzek; he can tell you what it is and so can I'; he says, 'We are to receive 75 per ' cent of everything we take out up to the 5th day ' of June, with the privilege of washing our dumps ' up any time after'; he says, 'Isn't that right, Kuzek?' To which Mr. Kuzek replied, 'Yes'. He says, 'You can take your papers up with you; ' we can make them out, and it won't take us ten ' minutes to sign them—you can take them up as ' you go'; that was the sum and substance of the conversation'' (trans. pp. 72-73).

This testimony and that of other witnesses as to conversations which are claimed to have taken place

between appellant and others respecting the amount of royalty the former was receiving or going to receive from the proceeds of the Marion Bench Claim, on which testimony we shall not particularly dwell because it is largely repetition, was, we submit, clearly objectionable, since appellees were seeking to reform an instrument made *after* the date of these alleged conversations; and even if they took place as narrated, *non constat,* but that the parties to the written instrument modified therein the previous oral arrangement under which appellees claimed to have been occupying and mining appellant's ground. It hardly requires the citation of authorities to demonstrate the validity of the objections made to this line of evidence and the correctness of our contention that reversible error was in this respect committed by the learned trial court.

Regarding the value of such alleged declarations or admissions, a leading case on the subject of reformation of contracts says:

> "It is the wise and salutary rule of our common law that whenever a bargain has been reduced to writing, this is conclusive as to the parties, and is not to be contradicted by parol evidence. *It was that there is no small risk that casual talk, hasty or thoughtless declarations, propositions tendered in the course of a negotiation but not finally agreed upon, might be misunderstood or misinterpreted by careless and inattentive hearers, or misrepresented by artifice or fraud.* But the deliberate formality of a written instrument affords usually the highest proof of the real terms of the final contract whether executed or executory. If this be true as to a simple article of agreement, or memorandum of a sale, then a contract of sale of land,

> ratified and attested by deed formally executed, delivered and received, stands on a still more solid foundation. In law, it is not to be contradicted, and when equity applies its peculiar powers to modify or rescind such an instrument, it is still to be regarded as the very highest presumptive evidence of the real contract, and throws upon the party contesting it, the burden of direct and positive proof of the facts relied upon to invalidate the instrument."
>
> *Marvin v. Bennett et al.,* 26 Wend. 168.

Many of these witnesses were also permitted by the court to testify to the *customary* royalty collected by the owners of claims in that district or neighborhood, which we contend was equally objectionable; for instance, the same witness Taylor was (trans. pp. 73-75) allowed by the court below, under objection interposed by appellant's counsel and made the subject of the sixth assignment of error *in extenso* (trans. pp. 202-203), to testify that the amount of royalty usually paid or reserved upon claims of the character and description of the Marion Bench Claim was 25 per cent. Conceding for the argument that this witness was, and other witnesses upon the same subject were capable of testifying upon the matter, although in many instances there was absolutely no foundation laid for such testimony, what relevancy had it to the question controverted? There is no evidence that the parties sought to incorporate this or any custom in their written instrument. Suppose it had been the custom for mine owners to allow lay men to work these claims for a prescribed period without any royalty whatever, would that custom be evidence of any value or materialty to show the con-

tents of a written agreement between a mine owner and a lay man concerning the operation of a mine, where perhaps the very motive of reducing the contract to writing was to provide terms contrary to any such prevailing custom? If a lease were sought to be reformed, would evidence be properly admissible to establish that custom which the parties sought perhaps to negative by their writing?

Hearne v. New England Etc. Ins. Co., 20 Wall. 488.

Further examination of the record shows that like testimony was given under similar objections by other witnesses and properly assigned as error. Neither the witnesses Cowden nor Marsh (trans. pp. 75 et seq.) were shown to have been competent to testify as to the existence of any custom regulating the collection of royalty by owners of mines from lay men, and we believe that we would unnecessarily consume the time of the court by further reference to this inadmissible evidence. It was objected to in the court below by counsel representing appellant and assigned thereafter as error.

One witness, Johnson, does not give any date whatsoever for the conversation which he claims to have overheard between appellant and some one else as to the amount of royalty which Mr. Kuzek was to receive from the mine (trans. pp. 89-90), and another witness, John Greve, was allowed by the court, under objection, to narrate a conversation which took place *several months before* any written instrument was executed between the parties to this suit (trans. p. 92).

T. M. Reed, the United States Commissioner, was called, among others, on appellees' behalf, and allowed to testify, despite appellant's objection, which is reviewable here under the eleventh assignment of error (trans. p. 204), as to the *purpose* for which the lost original lease was brought to him (trans. p. 93); and his evidence is weak as to the contents of the instrument respecting the royalty.

Before closing their case appellee Elliott was again recalled to the witness stand by appellees and was permitted to testify to a conversation between Taylor and himself in Kuzek's presence

"*before* the contract was reduced to writing",

wherein witness says he asked Taylor if the latter thought the ground would justify him in advancing to appellees some credit upon it, to which Taylor replied

"Sure, I think it will"

(trans. p. 95). Appellant objected to this evidence and bases his twelfth assignment of error upon the court's action in admitting it (trans. p. 204).

It has, we submit, no shadow or semblance of relevancy or competency to support it. It was responsive to nothing and only served to increase the volume of inadmissible evidence before the learned court below.

Finally, appellees once more recalled the witness Cowden, this time as a handwriting expert, in an endeavor to compare certain words written in pencil with corresponding words written in ink, a task which has baffled handwriting experts of greater competency. The court in this connection will bear in mind that the

duplicate original offered by appellant as Exhibit 2 was in ink and wholly, except as to the signatures, in appellee Elliott's handwriting; and the draft of the agreement known as Exhibit 3 was in pencil, partly in Elliott's handwriting and photographed. As the photographs of the documents themselves are not attached to the record, nor the originals before this court, the testimony and references to them given by this witness is obscure and valueless.

It also appears as a part of appellees' case that Mrs. Kuzek did not write any part of the draft agreement upon which the subsequent agreement made in duplicate was based (trans. p. 99).

To meet the evidence offered on appellees' behalf, appellant called but two witnesses, his wife and himself, the former testifying that she well remembered it was the 9th of March when the first original lease of the Marion Bench claim was executed (trans. pp. 99-100); and she particularly set forth the circumstances which impressed the date upon her memory. She recognized the draft agreement referred to, remembering what portion of it her husband wrote and that Elliott filled out the remainder, including the clause relating to the royalty to be paid to the lessor, to wit 75 per cent; for Elliott was a better penman than Kuzek. She further testified in part (trans. pp. 101-104):

> "When he wrote it Mr. Elliott, Mr. Magaha, Mr. Kuzek and myself were all in our cabin on the Marion Bench Claim. Mr. Kuzek said we might draw the paper up and Mr. Elliott was there, and said, '*We will draw up a copy first,*' and Mr. Kuzek had this drawn, this copy sometime in

December, and Mr. Elliott said, 'We will find this out first.' *Mr. Kuzek had attempted to write it and was going to start in and Mr. Elliott said, 'I could perhaps write it better than you could.'* He said that to Mr. Kuzek, so then Mr. Elliott took the paper and sat down and wrote this part which is written in pencil and read it as he wrote it out. He read, 'Pay to said lessor or'—'his'—he wrote 'his' and read it, 'legal representatives or assigns' and wrote the figures '75' and said '75 per cent of the gross output of said claim during'; then he wrote the year 'ending'; he wrote 'ending' and so on down. He wrote 'June' and spelled it as he wrote it out; 'the 5, 1904,' and so on until it was finished; he concluded to write another one as this was not a good copy, being part in lead pencil and part in pen and ink; it was better to write it fully out in one hand-writing with a pen and ink, and I said to Kuzek that Elliott and Kuzek and Magaha better go down and get an attorney or notary public to make out the paper, *and Mr. Elliott said that he could make them out just as good as anybody else, so he took the paper and pen and wrote it down following after the one he had there.* When he wrote the first original, the first lease that was right on top, this was right under and as he went on down, he followed it up—what he had written. After he got it written, Mr. Kuzek held this paper while Mr. Elliott read the other one—the original, and compared the papers to see if they were all right; then he handed the paper over to Mr. Kuzek to look over and read—he didn't read it—he handed it to me, and I read it over, the original, and Mr. Kuzek held the other one—the pencil one in his hand, and I read it aloud, and he compared it as I read. Then I handed it back to Mr. Kuzek, and Mr. Kuzek signed, then Mr. Magaha signed, then Mr. Elliott signed and I signed as a witness; then Mr. Kuzek wanted him to draw up another paper for him that we should keep, and Mr. Elliott says, 'Well, it is late'—it was

about 2 o'clock—and he says, 'We are bound to meet a party in town; I will make out the other copy tomorrow,' he says. Well, Mr. Kuzek thought it was all right and they went to town that afternoon, and Elliott didn't come back that next day. He was in town for about a week or ten days; then he stayed at home about two or three days—I couldn't say how long—and again went to town and stayed a couple of weeks. He came out again about the 2d of April, but I know he was not there the 1st of April, and worked about two days, and then Mr. Kuzek called his attention to drawing up the copy of the lease, so we could have one as well as they had. After supper, on the evening of the 4th of April, Mr. Kuzek, Mr. Elliott and myself, only being present—Mr. Magaha was not there—and while we were all sitting at the supper table, *Mr. Elliott wrote out this paper, the duplicate. He laid the original lease on the table before him when he wrote this out and also the pencil lease was laying on the table at the same time;* he wrote on down followed the original with this, and followed this on down as he did the first—the pencil one; and then after he got through with the writing of it, he handed the original over to Mr. Kuzek, and Mr. Elliott read this one out to the three of us, while Mr. Kuzek was holding the original; after he got through, he handed the piece of paper to Mr. Kuzek, and Mr. Kuzek looked it over and said he guessed it was all right. Mr. Kuzek handed this paper to me, still holding the original in his hand and the pencil lease, and I started and read this over aloud. Mr. Kuzek said, 'All right; it is alike'; and I handed it back to Mr. Kuzek and he put the two papers together, and then he signed this lay and then he put it back to Mr. Elliott. Mr. Elliott signed, and then I signed as a witness, and then when Mr. Kuzek wanted to go over and call Mr. Magaha—he was working on the boiler at the time—Mr. Elliott says, 'No, it is no hurry; Mr. Magaha can sign it tomorrow.' Then the next following

day, on the 5th of April, right after dinner, Mr. Kuzek called him into the little room we had and he signed this lay. I was standing in the room when he signed this; he read it before he signed it, and said it was all right, and handed it back to Mr. Kuzek, and it has been in Mr. Kuzek's possession, you might say, until it came into court. After the original was signed on the 9th of March Mr. Kuzek kept the pencil copy, and put it away with some other papers'' (trans. pp. 101-104).

We have quoted this testimony at length because it appears for the first time to show under what circumstances the draft of the agreement was made and under what circumstances each of the duplicates was thereafter prepared and executed. Mrs. Kuzek furthermore denied certain conversations testified to by appellees' witnesses (trans. pp. 104-105).

Her testimony was virtually unshaken upon a lengthy cross examination.

Mr. Kuzek, appellant, also called in his own behalf, testified, in corroboration of his wife, that the written lay on the Marion Bench Claim was executed March 9th, 1904, Elliott writing it out. Appellant had, on the previous December 5th, written, or rather filled in, a small part of the draft of the agreement which appears in ink (trans. p. 145); and then, by reason of his poor penmanship, postponed doing anything further on it (trans. p. 146). We here give his statement as to the circumstances attendant upon the execution of the two duplicates in his own language, as it appears in the record:

"At that time Mr. Elliott and Magaha came to my cabin—it was shortly after dinner and I wanted to get my paper. I asked him if I should go with them to town to draw up the paper and they said it was not necessary—'we will draw it up ourselves.' I says, You can draw it up; I started it up and didn't make it complete'; and Mr. Elliott says, I can make out the paper.' I says, 'All right.' I had the paper in my house; I sat down to begin—Mr. Elliott sat down alongside of me; *I passed him this paper, he looked at it, and so we decided to draw up the draft with a pencil. So he did draw up the draft with the pencil and then took another clean blank and wrote out the paper with a pen and ink.* After he did write it out then he says: 'I have to change the line about sluicing,' but he says, 'It is the same meaning, anyhow.' I looked that up, I says, I didn't think that makes much difference.' He says: 'I just shortened it up.' Then he read the paper over and handed it to me. I looked over it. He read it aloud and then he handed it to me, and I looked the paper over and handed it to my wife, and she read it and I held this paper in my hand to see that it all compared. It seems it all compared pretty well except this part, changed about sluicing the dump, and I thought that didn't have any effect in the paper. Then I signed, Mr. Magaha signed and Mr. Elliott signed, and I asked if I should call some of the other men to sign as a witness, and they said, 'Mrs. Kuzek can sign as a witness.' I said, 'That is all right; that is satisfactory'; and so she signed as a witness. Then I handed him the three blanks and asked him to draw up a copy for me, as is usually drawn up, a duplicate, and Mr. Elliott looked at the clock and he says, 'I don't think I have that much time to spare; I will draw up the paper tomorrow for you.' I says, 'That is all right—that is satisfactory'; and he says, 'We have to meet some parties in town shortly afternoon.' I says, 'That will be all right.' They hired me to

take off the boiler for them while they went to town; they went to town and I took care of the boiler for them that afternoon and that night till morning. They took the paper with them and I kept the pencil draft. When I asked Mr. Elliott to draw up the copy for me he says, 'You keep this memorandum; I will draw up the copy tomorrow.' He did not draw up the copy until about the 4th of April.

"*Plaintiff's Exhibit No. 2, the duplicate, was drawn up in my cabin by Mr. Elliott;* Mr. Elliott, Mrs. Kuzek and myself being present. Mr. Elliott came to the cabin, sat down, and pulled the paper out of his coat pocket, and I brought the blanks for him and *he spread out his paper and filled up the blank according to his paper;* after he had finished he read it over, and when he was through reading he passed both papers to me and he says, 'You look over it; they are both right.' I compared them and looked over them to see that the two were alike. I handed the second one—we call the duplicate—to Mrs. Kuzek, and I held the original while she was reading it over; when she was through she passed it over to me and I signed it, and Mr. Elliott signed, and I suggested that I go out and get Mr. Magaha from the boiler-room and get him to sign; and Mr. Elliott says, 'It don't make any difference; he might be busy; he can sign it tomorrow morning.' I says, 'All right,' and Mrs. Kuzek signed as a witness, and that was all that was done that evening. Mr. Magaha signed the next day, shortly after dinner; to my best recollection and remembrance he read it to himself; I then put the duplicate away with other papers in my box. In about a week or so I sent it to town by Mrs. Kuzek and she placed it on record; I also kept the pencil memorandum. Mr. Elliott took the original along with him as before. I first heard of the loss of the original paper on the 23rd of May. It was in the counting-room of the Alaska Banking and Safe Deposit Company, in the town

of Nome; Mr. Cowden, Mr. Elliott, Mr. Magaha and myself being present. I showed the duplicate to Mr. Cowden, and Mr. Cowden said I was to have 25 per cent according to the terms of the duplicate lease.

Q. In paragraph IV of the original lease. what figures or letters were inserted in line one of said paragraph after the words 'or assigns'?

A. After the words 'or assigns' was the figure '75'.

Q. Are you or are you not able to state that that is an exact copy of the original lease?

A. It is the same; when Mr. Elliott filled up the duplicate and passed both papers to me, he says, 'Look over them; they are both alike.' ''

(Trans. pp. 146-149.)

The only point upon which there seems to be any ambiguity in his testimony is as to whether or not he actually wrote anything on the draft immediately prior to the time that Elliott took it from him and filled it out before making the first original agreement, or merely picked up the pen preparatory to writing and went no further. Without doubt, however, Elliott filled out the greater part of the draft and completed it before drawing the first original therefrom. Appellant denies that he ever told anybody that the lessees were to receive seventy-five per cent of the gold dust from the mine (trans. pp. 177-178); and, referring to his desire to have a duplicate of the agreement made prior to the time it was executed, he says on cross examination:

''Q. How did you happen to save the pencil memorandum, Mr. Kuzek?

A. How did I happen to save it?

(Question read.)

A. I didn't get the duplicate, so I thought I would keep that in the event anything turned up and I didn't have a duplicate of it. I was supposed to keep that.

Q. You had been working for several months without a paper at that time?

A. Yes, sir.

Q. You never felt uneasy about it?

A. Well, there was no paper on either side then. No paper on either side then. I thought if there was any controversy, we would have just as good a chance as they would.

Q. Did you expect any controversy at that time?

A. No, sir.

Q. After the paper was made out, did you expect to have any controversy?

A. I didn't pay much attention to it; *I was waiting patiently until Elliott got sobered up, and I could get him to draw the paper up for me.* I didn't pay much attention to what was going on.

Q. Why did you save the pencil memoranda, then, after you got the other one?

A. I kept it with the other papers we had there; it didn't take extra room for it.

Q. Why was it that you were willing to let these parties work there on an oral lay when you were to receive 75 per cent of the gross output—why didn't you have it reduced to writing in the first place?

A. It was understood that sooner or later we were to draw up the paper, and we neglected it from day to day'' (trans. pp. 179-180).

He further states, and it appears to be established without contradiction, that no words were added to the draft of the agreement since the time it was prepared (trans. pp. 108-181).

Thereafter the court, in a paper designated as an "opinion" (trans. pp. 181-182), "finds that the allega-" tions of the plaintiff's complaint have not been " sustained by the evidence", despite the fact that there was no controversy over the facts that appellant was the owner of the mining claim in question, that the lay agreement set forth in the complaint had been duly executed (though reformation was granted), and that gold had been extracted from the claim by the lessees upon which some royalty was admittedly due appellant. The fact that the stipulation set forth in Finding VII was entered into (trans. pp. 187-188), and at least some payment made to Kuzek as rent or royalty, negatives the correctness of the court's so-called "opinion" above quoted. What the learned court really meant was, that in his judgment the lease should be reformed in accordance with the allegations and prayer of the answer.

Upon a consideration of the evidence we believe it will be at once apparent that the learned court below must have relied entirely upon statements or admissions attributed to appellant in order to find that the alleged mistake made by appellees was mutual to both parties; and, even taking into consideration and assuming as true the conversations testified to by some of appellees' witnesses as competent and material evidence upon the point in issue, we submit that the evidence falls far short of making it a satisfactory case to authorize the court below to reform the instrument. *It will be remembered that the first original lease was prepared from a draft which contained the identical provision*

respecting the royalty that appellant contends for, and that is also contained in the second agreement. As before stated, there is no contradiction of the fact that the draft was fully filled up before the first original was prepared, and the second original was prepared from these documents. These original instruments were wholly in the handwriting of appellee Elliott, excepting the signatures, and part of the draft was likewise in his handwriting. The only document which appellees claim provided for a twenty-five per cent royalty to the appellant is the first agreement, which appears to have been unaccountably and mysteriously lost; and such loss, under the circumstances of the case, with two written documents—one made before and one after it—at variance therewith upon the precise point in issue, must give rise to grave doubt as to the contents of the lost original.

Each duplicate was an original.

1 Greenleaf on Evidence (16 ed.), Sec. 563.

We respectfully submit that appellees have failed to make out a case sufficient to warrant the trial court's judgment or decree in granting reformation of the written lease. The mistake, if it existed, was wholly occasioned by their inexcusable neglect which was not the result of ignorance, surprise, imposition on the part of, or misplaced confidence in anyone.

> "If a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard deliberately signs a written agreement without informing himself as to the nature of its contents, he will

nevertheless be bound, for in such case the law will not permit him to allege as matter of defense his ignorance of what it was his duty to know, nor will a court of equity assist him to avoid the consequences of his negligence."

29 Am. & Eng. Encycl. Law (2nd ed.) 832, and cases there cited.

"Equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence". He must be free from culpable negligence.

2 Pomeroy, Equity Jurisprudence, Secs. 839, 856;

1 Story, Equity Jurisprudence, Sec. 146;

24 Am. & Eng. Ency. of Law (2nd Ed.), pp. 656-657;

Miller v. St. Louis etc. R. Co., 162 Mo. 424; 63 S. W. 85;

Persinger's Adm. v. Chapman et al., 93 Va. 349; 25 S. E. 5;

18 Ency. Pl. & Pr., p. 779;

Pope et al. v. Hoopes et al., (C. C. A.) 90 Fed. 451.

The mistakes which equity will reform are not those which might have been avoided by common and ordinary care and which are the results of negligence.

Young et al. v. McGown, 62 Me. 56;

Graham v. Berryman et al, 19 N. J. Eq. 29;

Voorhis v. Murphy, 26 *id.* 434;

Emery v. Mohler, 69 Ill. 221;

Johnston v. Dunavan et al., 17 Ill. App. 59;

First Nat. Bank v. Gough et al., 61 Ind. 147;

Toops v. Snyder et al., 70 *id.* 554.

In

Moran v. McLarty, 75 N. Y. 25,

the syllabus, in part, reads:

> "Where a party previous to executing a written agreement has full opportunity to examine it so as to know its contents, yet voluntarily signs without making such examination, he cannot claim a reformation of the agreement simply upon evidence that it contains obligations he was not connizant of and did not intend to agree to; there must be clear evidence of a mutual mistake or of fraud to authorize a reformation."

In re West Devon Great Consols Mine, 38 Ch. D. 51;

Grymes v. Sanders et al., 93 U. S. 55;

Montgomery v. Charleston, C. C. A., 99 Fed. 825;

Pope et al. v. Hoopes et al., supra; S. C. 84 *id.* 927;

Fitzpatrick v. Ringo, (Ky.) 5 S. W. 431.

Elliott had the advantage of Kuzek in being a better penman and he offered to draw up the papers. Before preparing the first original he completed a draft of the agreement and with that before him as a model prepared the written contract. He had both the draft and this first original before him when he prepared the duplicate or second original, and it is unquestioned that both the draft and the second original provided for the payment of a 75 per cent royalty to appellant. If the latter, before the preparation of the final contract, had himself inserted this amount of royalty in the draft, would it not have been indicative of his understanding of the agreement which the parties had entered into, either

oral or written? And if Elliott wrote it, does it not conclusively show that appellees understood they would receive only 25 per cent of the gross output of the mine, unless Elliott were guilty of such gross negligence as to bar him from relief in a court of equity?

Looking at the case in its most favorable aspect for appellees, they were at the most only entitled to a *cancellation* of the contract on the ground that the minds of the parties thereto had not met.

1 Story's Equity Jurisprudence, 10th ed., sec. 164, e;

for,

> "A written instrument will not be reformed unless the correction asked for will make the contract express the understanding of both parties thereto at the time it was executed, because where the plaintiff only was mistaken and there was no fraud or other inequitable conduct on the part of the defendant, reformation would result only in the inequitable consequence of shifting from the plaintiff to the defendant the burden of abiding by a contract which he never made."
>
> *18 Enc. Pl. & Pr.,* 781, 782.

To warrant reformation

> "it must appear that both have done what neither intended. * * * Where the minds of the parties have not met there is no contract and hence none to be rectified."
>
> *Hearne v. New England etc. Ins. Co., supra;*

See particularly,

Diman v. Providence etc. R. Co., 5 R. I. 130.

Surely it cannot be said, in executing the lease offered in evidence, that

> "both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract and hence none to be rectified."

Hearne v. New England etc. Ins. Co., supra;
Hughes v. Mer. Mut. Ins. Co., 55 N. Y. 265;
Lyman et al. v. United Ins. Co., 17 Johns 373.

In the absence of other competent evidence a direct conflict of testimony is conclusive against the reformation of a written instrument.

Bobb v. Bobb et al., 7 Mo. App. 501.

It is well established that in an action to obtain the reformation of an instrument on the ground of mistake, the essential prerequisites of such mistake are ignorance, surprise, imposition or misplaced confidence.

2 Pomeroy, Equity Jurisprudence, Sec. 89;
1 Story, Equity Jurisprudence, Sec. 110.

The latter author also says that parol evidence is admissible to reform contracts in cases of fraud, mutual mistake and accident.

1 Story, Equity Jurisprudence, Secs. 155, 156.

There can be no reformation of an instrument required by the statute of frauds to be in writing by parol evidence "except upon the occasion of mistake, "surprise or fraud",

2 Pomeroy, Equity Jurisprudence, Sec. 866,

and reformation is granted under proper circumstances where the mistake is mutual or where the "mistake of one party" is "accompanied by fraud or other in- " equitable conduct of the remaining parties."

2 Pomeroy, Equity Jurisprudence, Sec. 1376.

Judge Story says that a mistake in or ignorance of facts by parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. .

1 Story, Equity Jurisprudence, Secs. 151, 152.

"Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, but may *rescind* and *cancel* a contract upon the ground of a mistake of facts material to the contract of one party only."

Werner v. Rawson, 89 Ga. 619; 15 S. E. 813;

15 Am. & Eng. Ency. of Law (1st Ed.), p. 647.

"Where the plaintiff alleges a mistake as a ground for relief, there is a plain distinction between reforming a writing and cancelling it. Under some circumstances, equity will cancel a contract because of a mistake of both or one of the

parties. Thus, while a court of equity will not reform a written contract upon the ground of mistake, unless the mistake is shown to be common to both parties, yet it may exercise its power to grant relief in a proper case by rescinding and cancelling the writing upon the ground of a mistake of facts material to the contract by one party only."

18 Ency. Pl. & Pr., p. 761,

and cases there cited.

"A mutual mistake which will afford a ground for relief by a reforming of a written instrument means a mistake reciprocal and common to both parties, when each alike labors under a misconception in respect to the facts."

MacVeagh et al. v. Burns, 2 S. Dak. 83; 48 N. W. 835;

18 Ency. Pl. & Pr., pp. 781, 818;

Evarts v. Steger et al., 5 Or. 147;

Newell et al. v. Stiles, 21 Ga. 118;

Arter v. Cairo Democrat Co. et al., 72 Ill. 434;

Meier et al. v. Kelly et al., 20 Or. 86;

24 Am. & Eng. Ency. of Law (2nd Ed.), pp. 648-650,

and cases there cited.

Many are the authorities bearing upon the character and strength of evidence required to justify a court in reforming an instrument. Both of these eminent authors on equity, Professor Pomeroy and Judge Story, insist that where relief may be granted on parol evidence such evidence "must be *most clear and convincing* " * * * the *strongest possible*", reformation only being granted "upon *a certainty of the error*", that is

by such evidence as would be virtually required to convict in a criminal case.

2 Pomeroy, Equity Jurisprudence, Sec. 859;
1 Story, Equity Jurisprudence, Sec. 157.

See further,

Adams et al. v. Henderson et al., 168 U. S. 573.

It is said that where the only relief sought is the reformation of an instrument, a previous demand for its correction is necessary therefor.

24 Am. & Eng. Ency. of Law (2nd Ed.), p. 656, and cases cited.

Said the Supreme Court of the United States,

> "Of course, parol proof, in all such cases," (for the reformation of a contract on the ground of mistake) "is to be received with great caution. and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the *clearest* and *most satisfactory* character."

Snell et al. v. Atlantic etc. Ins. Co., 8 Otto 85.

> The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be *sufficiently cogent to thoroughly satisfy the mind* of the court."

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, and authorities there cited.

In

Ivinson v. Hutton, 8 Otto 79,

"Relief in such a case can only be granted in a court of equity; and Judge Story says, if the mistake is made out of proofs *entirely satisfactory,* equity will reform the contract so as to make it conform to the precise intent of the parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made *entirely plain,* equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy * * * and the power" to reform "should always be exercised with *great caution,* and only in cases where the proof is *entirely satisfactory.* * * * The evidence" as to the mistake "must be such as to leave *no reasonable doubt* upon the mind of the court * * * The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended * * * A mistake on one side may be a ground for rescinding, but not for reforming, a contract * * * Where the minds of the parties have not met there is no contract, and hence none to be rectified * * * ", citing many authorities.

In

Howland v. Blake et al., 7 Otto 624,

the court said:

"Where a written instrument is sought to be reformed upon the ground that by mistake it does not correctly set forth the intention of the parties * * * the burden rests upon the moving party of *overcoming the strong presumption arising from the terms of the written instrument.* If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony *entirely plain and convincing beyond reasonable*

controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

Marvin v. Bennett et al., supra.

"It can scarcely need authority to prove that the evidence necessary to sustain such an alleged essential variance between the contract intended and that executed, should be *strong and convincing.* The rational presumption will always be that the deeds were the conclusive agreements; but the authorities go beyond this. To invalidate such an instrument, said Lord Chancellor Thurlow, 'a mistake should be proved *as much to the satisfaction of the court as if it were admitted',* Brown C. C. 94. In another analogous, the same able Chancellor demanded *'irrefragable proof',* and his more illustrious predecessor, Lord Hardwicke, insisted that there must be 'proper proof, and the *strongest proof possible';* and in all these requirements of the *highest evidence,* our own Chancellor Kent has concurred."

Gillespie et al. v. Moon, 2 Johns. Ch. R. 585;

Harrison v. Insurance Co., 30 Fed. 862;

Kleinsorge et al. v. Rohse, (Or.) 34 Pac. 874;

Kuchenbeiser et al. v. Beckert et al., 41 Ill. 172;

Ford et al. v. Joyce et al., 78 N. Y. 618.

In *Vary v. Shea et al.,* 36 Mich. 388, Chief Justice Cooley said:

"The evidence of a mistake in a written contract on which the court should act in giving relief, ought to be *so clear as to establish the fact beyond cavil.* Especially should this be the case when the party setting up the mistake has had the contract

prepared by his own professional adviser, and apparently with care and deliberation."

The reformation of a contract

"is an exercise of power which a court of equity, if not reluctant to make, would make only on the *strongest and clearest* evidence, and for the *strongest* reasons."

1 Parsons Mar. Ins. 151.

"To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof *morally irresistible.*"

Id., 151, note 1.

The proof of the error

"must be such as to remove *all possible doubt* from the mind of the court."

1 Duer on Ins., Lect. 1, note XI.

"It must be *strong, irrefragable evidence.*"

Lord Thurlow in Shelburn v. Inchequin, 1 Brown Ch., 341.

"It should be proved as much to the satisfaction of the court *as if it were admitted.*"

Irnham v. Clark, 1 Brown Ch., 92;

Townsend v. Stangroom, 6 Ves. Jr. 328.

The evidence of mistake must be *plenary,* and leave no doubt in the mind.

Tucker v. Madden, 44 Me. 216.

So Chancellor Kent, in

Lyman v. United Ins. Co., supra,

in dismissing a bill to reform a policy, refers to

Gillespie v. Moon, supra.

and says that in that case

> "reference was made to the successive opinions of Lords Hardwicke, Thurlow and Eldon (1 Ves., 317; 1 Brown, 94; 6 Ves. 328), in favor of the most *demonstrative* proof, especially against the answer denying the mistake."

Graves v. Boston Mar. Ins. Co., 2 Cranch. 419;

Hileman v. Wright, 9 Ind. 127;

Hall v. Clagett, 2 Md. Ch. Dec. 153;

Philpot v. Elliott, 4 Md. Ch. Dec. 275;

Watkins v. Stockritt, 6 Har. & John. 445;

Davidson v. Greer, 3 Sneed 384;

Kent v. Manchester, 29 Barb. 595.

> "It has been required by the party seeking to be relieved upon the ground of mistake, to produce, *if not quite, almost incontrovertible proof,* or, to use the language of a distinguished chancellor, 'proof clear and overwhelming.'"

Beards Exec'r v. Hubble, 2 Gill 431;

Nevins v. Dunlap, 33 N. Y. 676;

Newton v. Marsden, 31 Law J. Ch. 690-709.

> "The proof must be such as will strike all minds alike, as being *unquestionable* and free from doubt."

Edmonds' Appeal, 59 Penn. St. R. 220-222;

1 Story Eq. Jr., sec. 157;

Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45; 107 Mass. 290-317;
United States v. Munro, 5 Mason 572-577.

In

Bowers et al. v. N. Y. Life Ins. Co., 68 Fed. 785,

the court quotes approvingly from a Maine decision that

> "a deed which can be seen and read is a wall of evidence against oral assaults, and cannot be battered down by such assaults, unless the evidence is *clear and strong, satisfactory and convincing.*"

Can it be said that the evidence in this case upon which reformation of the contract was granted conforms to the requirements of strength and conclusiveness laid down by the eminent authorities we have just briefly quoted? Does the perusal of the record carry conviction to the unprejudiced mind that the parties to this controversy agreed upon a royalty of 25 per cent to the lessor, despite the positive asseverations to the contrary of appellant who executed the instrument as principal, and of his wife who executed it as a witness, and despite the provisions, controlling in their effect, of the draft of the instrument thus reformed and the duplicate of that original subsequently made and proffered in evidence? Does a case commend itself to the court where the party seeking reformation admits his own carelessness and admits the existence of circumstances that show he was more than merely careless when he, by his own hand, prepared and executed the instru-

ment which he subsequently attacked? If the terms of instruments solemnly entered into can thus be set at naught upon loose admissions or declarations, if made at all, and the vague testimony of those who claim to have seen in the lost instrument the provision for which appellees contend, of what avail is the writing itself, or the terms of the agreement previously reduced to writing in the draft from which such agreement was copied? The decision of the court below operates to place a premium upon carelessness and negligence utterly at variance with the rules laid down by the learned chancellors whose opinions we have referred to and who have viewed the reformation of a writing deliberately entered into as a serious matter, not to be granted unless clearly and convincingly warranted by the facts and circumstances of the case.

We submit that the evidence utterly fails to sustain the judgment of the learned court below and, for the reasons hereinbefore given, that it should be reversed.

Charles Page,
E. J. McCutchen,
Samuel Knight,
Counsel for Appellant.

No. 1220.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY KUZEK,

Appellant,

vs.

CHARLES F. MAGAHA and
WILLIAM ELLIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

J. C. CAMPBELL,
W. H. METSON,
F. C. DREW,
C. H. OATMAN,
IRA D. ORTON,
Attorneys for Appellees.

The James H. Barry Co.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,

Appellant,

vs.

CHARLES F. MAGAHA AND WILLIAM ELLIOTT,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This suit was commenced by plaintiff and appellant to enforce compliance by defendants with the terms of a lay lease under which the defendants were engaged in mining upon a placer claim owned by the plaintiff. The lease as claimed by plaintiff is set forth in full in the complaint (Tr., pp. 4, 5, 6). It is then alleged that under the lease the defendants entered upon the claim and extracted

therefrom large dumps of pay gravel; that on May 18th, 1904, the defendants commenced sluicing the pay dumps and were still engaged in so doing, at the time the action was commenced; that on May 23d, 1904, the defendants cleaned up 54 8-100 ozs. of gold and in company with plaintiff took the same to the Alaska Banking and Safe Deposit Company in Nome, to have the same assayed, sold and divided; that since said 23d day of May, 1904, defendants continued to sluice, and on May 28th, 1904, the date of the commencement of this suit, brought into town in company with plaintiff, about 35 pounds of gold of the value of about $8,525. (Tr., pp. 6, 7.)

The complaint then alleges demand by plaintiff upon defendants that they pay and deliver to him 75 per cent. of said gold dust, amounting to about $6,057.00, that defendants refused to pay him 75 per cent, but offered him 25 per cent, which being declined, they kept the entire proceeds.

Further allegations are made that the unsluiced dumps on the premises contain gold to the amount of about $30,000.00; that unless restrained by the Court, defendants will sluice up the same and retain 75 per cent of the same; that plaintiff has no plain, speedy or adequate remedy at law. Insolvency of the defendants is alleged (Tr., p. 9).

The prayer of the complaint is as follows (Tr., pp. 9, 10):

"Wherefore plaintiff prays:

"1st. For the recovery of the possession of 75 per

cent. of the gross proceeds of gold already taken from said premises.

"2d. That this Court issue an injunction against the said defendants and each of them restraining the said defendants, their attorneys, servants, employees, agents and all persons in privity with them, or either of them, from sluicing the aforesaid dumps or extracting the gold therefrom until the final hearing of this cause.

"3d. That an accounting be had of the gold already extracted by the defendants, and that the said defendants be adjudged and decreed to deliver to this plaintiff 75 per cent of all gold so taken and extracted from said dumps by the said defendants or by any other persons or employees on their behalf.

"4th. That the plaintiff be adjudged and decreed to be the owner of 75 per cent of all the gold which is now deposited in said dumps.

"5th. Plaintiff prays that a receiver may be appointed by this Court to take charge of the dumps described in plaintiff's complaint and to protect the same during the pendency of this action, and to dispose of the same according to the judgment and decree of this Court.

"6th. Plaintiff prays for general relief.

"A. J. BRUNER,
"Attorney for Plaintiff."

In their answer (Tr., pp. 13-23), defendants deny that

on December 5th, 1903, they executed the lease in the words and figures as set forth in the complaint, and affirmatively allege substantially as follows: That on or about November 18th, 1903, plaintiff orally agreed with defendants to allow them to prospect a few days on the claim in question with a view of taking a lay; that on November 20th, 1903, the parties agreed that the defendants might continue working on a lay of 25 per cent royalty to plaintiff, and that they continued working with a thawer extracting pay dirt, but not sluicing, until about March 4th, 1904; that prior to that time no written lease had been executed, but on or about said March 4th, the lease was reduced to writing, being written by defendant Elliott, using a blank form, and that the lease so reduced to writing was substantially in words and figures as set forth in plaintiff's complaint except that it provided for the payment to plaintiff of 25 per cent royalty instead of 75 per cent as claimed by plaintiff; that said lease, drawn up on March 4th, 1904, providing for the payment of 25 per cent royalty to plaintiff "was on said "4th day of March, 1904, actually signed by plaintiff and "defendants and delivered to defendants and is and was "at all times herein mentioned the original lease in writ-"ing between the parties" (Tr., p. 15). The answer then alleges that at plaintiff Kuzek's request, the lease was dated December 5th, 1903, although never actually drawn up, signed or executed until March 4th, 1904. The circumstances of the drawing up and execution of what was in-

tended to be a duplicate of this original lease retained by plaintiff are thus alleged in the answer (Tr., pp. 15-17):

"That afterwards and on or about the 3d day of April, "1904, at the request of the said Stanley Kuzek, the said "defendant Elliott drew up a duplicate or copy of said "lease, to be retained by the plaintiff Kuzek; that in "drawing up said duplicate or copy, defendant Elliott "used the same kind of a printed blank as was used by "him for said original lease, but in copying and drawing "the same he erroneously wrote in the words '75 per "cent' to be paid to the lessor, instead of '25 per cent' "which was written in said original lease. That said "copy or duplicate of said lease so drawn up on said 3d "day of April, 1904, in which said mistake was made as "aforesaid was signed by the plaintiff and defendants "and delivered to said Kusek; and the defendants allege "on their information and belief that said duplicate copy "of said lease is the document set forth in paragraph II "of plaintiff's complaint. That in signing and executing "said duplicate or copy of said lease the plaintiff and de- "fendants both intended to execute an exact duplicate of "the original lease entered into between the parties, and "at the time the same was signed by the plaintiff and de- "fendants both the plaintiff and defendants believed said "copy or duplicate lease to be an exact and literal copy "of the original lease entered into between the parties "hereto, which provided for the payment of 25 per cent "of the gross output of said claim to plaintiff. That the "mistake made by plaintiff and defendants in copying

"and signing said lease was mutual, and was inadvert-
"ently made by the defendant Elliott in copying said
"original lease, and was not known to either the plaintiff
"or defendants until considerable time afterwards. That
"said copy or duplicate lease does not and did not ex-
"press the true agreement between the parties as set
"forth in the original lease entered into between them,
"but by said mistake and inadvertence aforesaid, it was
"made to appear thereby that the plaintiff, lessor, was
"entitled to 75 per cent of the gross output of said claim,
"whereas and in fact the true mutual agreement between
"the parties was and is that the defendants are entitled
"to 75 per cent of the gross output of said claim, and the
"plaintiff to 25 per cent. That it was not intended by
"drawing up and signing and executing said copy or du-
"plicate lease to change or modify in any particular the
"original lease in writing, entered into between the par-
"ties aforesaid."

It is then alleged that defendants have inadvertently lost or mislaid their "original lease" and that they have made long, careful and diligent search for it but were unable to find it. (Tr., p. 17.)

The other allegations of the answer refer to the amount of gold taken out and the dispute between plaintiff and defendants in relation to the division of the same. The answer prays for the following relief (Tr., p. 23):

"Wherefore the defendants pray:

"1st. That the injunction heretofore issued herein be
"dissolved.

"2d. That the Court, by its decree herein, correct said "duplicate or copy of a lease between plaintiff and de- "fendants, by changing the words '75 per cent' therein "to '25 per cent,' in so far as said duplicate or copy of "said lease may in any way affect the rights of plaintiff "and defendants.

"3d. That the Court adjudge and decree that the de- "fendants are entitled to 75 per cent of the gross output "of said dumps of pay gravel extracted by them from the "premises described in plaintiff's complaint, and that "the plaintiff is entitled to 25 per cent.

"4th. That the Court adjudge and decree that the de- "fendants be allowed to continue in possession of said "premises and sluice and clean up said dumps of pay "gravel, aforesaid, and retain therefrom 75 per cent of "the gross amount of gold produced therefrom.

"6th. That the defendants have judgment for their "costs and disbursements herein and for all other relief "which they may be in equity entitled.

"IRA D. ORTON,
"Attorney for Defendants."

A reply was filed putting in issue the alleged mistake in making the so-called duplicate lease. It was admitted however that no written lease whatever was drawn up until some time in March, when the original lease was prepared and executed and retained by defendants and also

that the so-called duplicate was not made until on or about April 4th, 1904. (Tr., pp. 27-33.)

The principal and controlling issue of fact in the case was whether or not the original lease provided for the payment of 25 per cent royalty instead of 75 per cent and whether or not the defendant Elliott in afterwards attempting to write a duplicate of the lease made a mistake in copying by writing 75 instead of 25 per cent. The Court so found in the following language quoting from the opinion: "The Court * * * finds that the allega-"tions of the plaintiff's complaint have not been sus-"tained by the evidence, and further finds that the allega-"tions of the defendants' answer as to the terms of the "original lease have been clearly and convincingly sus-"tained by the evidence." (Tr., p. 182.)

The gold contained in the dumps having been cleaned up by a receiver appointed by consent and in accordance with the prayer of plaintiff's complaint the judgment finally ordered the proceeds to be divided according to the terms of the original lease, *i. e.,* 25 per cent to plaintiff and 75 per cent to defendants. (Tr., pp. 190-191.)

ANSWER TO APPELLANT'S POINTS AND AUTHORITIES.

I.

Plaintiff's first point is that "an equitable defense "seeking the reformation of the lease was improperly "pleaded in the case at bar". There are a number of

complete answers to plaintiff's contention on this point:

First—This suit is in equity and not an action at law, which plainly appears by the allegations and prayer of the original complaint. The prayer of the complaint which contains but one cause of action is entirely for equitable relief and includes prayer for an accounting, for an injunction, the appointment of a receiver and for general relief. An injunction was actually issued and a receiver appointed.

None of the relief sought in this suit was legal. Plaintiff alleges in his complaint that he has no "plain, speedy or adequate remedy at law" (Tr., p. 9), and he is not able to ask as a part of the relief sought a judgment for any specific sum, but asks that an "accounting be had of the gold extracted by the defendants" (Tr., p. 10).

To show how satisfied plaintiff was that his suit was in equity it is only necessary to suggest that he brought it into this Court by appeal and not by writ of error (Tr., pp. 197-200). If the Court should be of opinion that the case is an action at law, we respectfully ask that the appeal be dismissed as it is well settled that if an action at law is brought into this Court by appeal intead of by writ of error, it must be dismissed for want of jurisdiction.

Bevins vs. *Ramsay,* 11 How., 185.
Mussina vs. *Cavazos,* 6 Wall., 355, 358.

Second—No objection having at any time been made to the pleading of an equitable defense, such objection is

that the so-called duplicate was not made until on or about April 4th, 1904. (Tr., pp. 27-33.)

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Bevins vs. *Ramsay,* 11 How., 185.
Mussina vs. *Cavazos,* 6 Wall., 355, 358.

Second—No objection having at any time been made to the pleading of an equitable defense, such objection is

waived. Even the objection that a suit should be at law instead of in equity is waived if not raised at the proper time.

Insley vs. *United States,* 150 U. S., 512, 515.

A case directly in point is *Shields* vs. *Mongollon Exploration Co.,* 137 Fed., 539. This case came by writ of error to this Court from the District of Alaska, and was an action at law. An equitable defense for reformation of a deed was pleaded and affirmative relief prayed for and granted. Such practice was claimed as error, but this Court in overruling the contention, through Mr. Justice Gilbert, said: "But the plaintiff in eror does not and did "not in the Court below, question the power of the trial "Court to deal with the equitable defense which was in-"terposed in the present case, nor its power to proceed "and decree affirmative relief which was accorded in the "reformation of the deed." (137 Fed., 539, 547-8.)

Third—No assignment of error is made upon this point. This is admitted by the appellant, but he insists that the alleged error is a "plain error" within the language of Rule 11 of this Court which the Court may notice at its option. The cases where the Court would so interpose are rare and certainly should not be extended to embrace an alleged error in procedure not involving the merits of the controversy. Where the defect is one which may be waived no review thereof can be had where no assignment of error is found in the record.

Clinton E. Worden Co. vs. *Cal. Fig Syrup Co.,* 102 Fed., 334 (C. C. A.)

Fourth—Even if we concede that plaintiff's action is at law, the defendants had under the Alaska Code the right to interpose thereto all the defenses which they might have, whether legal or equitable.

"The distinctions between actions at law and suits in "equity, and the forms of all such actions and suits, are "abolished and there shall be but one form of action for "the enforcement of private rights and the redress and "prevention of private wrongs, which is denominated a "civil action."

Alaska Code of Civil Procedure, sec. 1.
Carter's Ann. Code, Alaska, p. 145.

"All the forms of pleading heretofore existing in ac- "tions at law and suits in equity are abolished and here- "after the forms of pleading in Courts of record and the "rules by which the sufficiency of the pleadings is to be "determined shall be those prescribed by this Code."

Alaska Code of Civil Procedure, sec. 54.
Carter's Alaska Code, p. 155.

These sections of the Alaska Code were *not* copied from the Oregon Code, but in Oregon on the contrary the distinction between actions at law and suits in equity is preserved. That section of the Oregon Code which is similar to section 1 of the Alaska Code of Civil Procedure reads as follows:

"The distinction heretofore existing between forms of

"actions at law is abolished and hereafter there shall be "but one form of action at law for the enforcement of "private rights or the redress of private wrongs."

Oregon C. C. P., sec. 1.
I Hill's Annotated Laws of Ore., ed. 1887, p. 130.

In construing this section of the Oregon Code, the Supreme Court of Oregon has had occasion to observe that the rule in most of the code States abolishing the distinction between actions at law and suits in equity has not been adopted in Oregon, but it is the distinction between forms of actions at law only that is abolished.

Beacannon vs. *Liebe,* 11 Ore., 443.
Burrage vs. *Bonanza G. & Q. M. Co.,* 12 Id., 169.

The Oregon Code makes specific provision for suits in equity in the following language:

"The enforcement or protection of a private right or "the prevention of or redress for an injury thereto, shall "be obtained by a suit in equity in all cases where there "is not a plain, speedy nad adequate remedy at law. * *"

Oregon Code Civil Proc., sec. 380.
I Hill's Annotated Laws of Ore., ed. 1887, pp. 404, 405.

This section of the Oregon Code was not carried into the Alaska Code, and the action of Congress by abolishing the distinction between actions at law and suits in

equity in Alaska, instead of merely abolishing the distinctions between "forms of actions at law" as provided in the Oregon Code of Civil Procedure, signifies the intention of Congress to adopt the rule in force in other code States and Territories that legal and equitable relief may be sought in the same action and equitable defenses may be pleaded in actions at law.

Pomeroy in his work on *Remedies and Remedial Rights Under the Codes* (2d ed.) says at p. 107: "Another "practical effect of removing the distinction between ac- "tions at law and suits in equity is shown in the employ- "ment of equitable defenses to actions brought to enforce "legal rights and to obtain legal remedies." Sections 87 to 97, pages 107 *et seq.* of this text book contain a full discussion of this subject and is a complete answer to the appellant's contention.

The territorial statutes of the former territories of Idaho and Montana contained provisions almost if not exactly similar to the Alaskan Code, and it was held by the Supreme Court of the United States that under these codes legal and equitable relief could be obtained in the same action and by the same complaint.

Basey vs. *Gallagher,* 20 Wall., 670, 680.
Ely vs. *New Mexican, etc., R. R. Co.,* 129 U. S., 292.
Idaho, etc., Land Co. vs. *Bradbury,* 132 U. S., 509, 513.

From these authorities, it may be said *a fortiori* that an equitable defense may under such codes be properly pleaded to a complaint at law.

The answer of defendants is also criticised by appellant because it is claimed the affirmative defensive matter is not stated separately from the denials. Conceding this to be true, it is not a matter for the attention of the Appellate Court, first because it is not assigned as error, and secondly because it was not complained of or properly raised in the Court below. Such an objection is waived unless made at the proper time by demurrer or motion.

Hagely vs. *Hagely,* 68 Cal., 348.

II.

THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS AND DECISION OF THE COURT CAN NOT BE CONSIDERED IN THE APPELLATE COURT BECAUSE THE BILL OF EXCEPTIONS DOES NOT CONTAIN ALL THE EVIDENCE.

Not only does the bill of exceptions in this case omit to state that it contains all the evidence introduced in the Court below, but it affirmatively appears that some very important evidence is omitted. Plaintiff's exhibit No. 3, mentioned at pages 54 and 55 of the transcript, and with reference to which defendant William Elliott testified in great detail, is omitted entirely. Photographs of this exhibit and also of plaintiff's exhibit No. 2 were offered in evidence by the defendant and admitted without objection. (Tr., p. 97.) These photographs are not contained

in the record. These exhibits and their photographs are the most important pieces of evidence introduced in the Court below because it was from an inspection of them that the Court was able to ascertain the absolute falsity of plaintiff's testimony that the part of the preliminary unsigned draft of lease providing for the royalty of 75 per cent to plaintiff was in the handwriting of defendant Elliott. And it was by this document, Plaintiff's Exhibit 3, that the Court was able to see that the plaintiff Kuzek had deliberately and wilfully written in the 75 per cent, and then wilfully sworn falsely that it was written by the defendant Elliott. A memorandum book of Mrs. Kuzek, the plaintiff's wife, produced by her to refresh her memory was introduced in evidence and marked "Defendant's Exhibit No. 3" (Tr., p. 136). Mrs. Kuzek was examined at length on this Exhibit (Tr., p. 136-145), and it was a very important item of evidence to show that both Mr. and Mrs. Kuzek were wilfully testifying falsely. No part of this exhibit is contained in the record, neither is the original brought to this Court as might be done under the rules. This exhibit was most important on the question of handwriting. The affidavit of Stanley Kuzek, "Defendants' Exhibit No. 4," and the affidavit of Bertha Kuzek, "Defendants' Exhibit No. 5," are omitted from the Bill of Exceptions (Tr., p. 181. These affidavits were used in the cross-examination of the plaintiff and his wife and were introduced to contradict and impeach them.

It is well settled that unless the bill of exceptions

shows affirmatively that it contains all the evidence the sufficiency of the evidence cannot be reviewed in this Court.

U. S. vs. *Copper Queen,* 185 U. S., 495.
Clune vs. *U. S.,* 159 U. S., 590.
Met. Nat. Bank vs. *Jansen,* 108 Fed., 572 (C. C. A.).
Nashua Sav. Bk. vs. *Anglo-Am. L. M. & A. Co.,* 108 Fed., 764 (C. C. A.).

Counsel for appellant say, on page 8 of their brief, that it may properly be assumed that the bill of exceptions contains all the evidence. To this point, counsel cite *Gunnison County* vs. *Rollins et al.,* 173 U. S., 255. In the case cited, the bill of exceptions did not expressly state that it contained all the evidence, but entries in the bill sufficiently showed that it did contain it all. This case is not in point here as there are no entries in the bill indicating that it contains all the evidence, but, on the contrary, it appears that some of it omitted.

III.

THE ASSIGNMENTS OF ERROR ARE NOT SUFFICIENT TO AUTHORIZE THIS COURT TO REVIEW THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS AND DECISION OF THE COURT.

Preliminarily to a discussion of this point, it may also be observed that the brief of appellant does not contain

any specification of errors relied on, as required by rule 28 of this Court. In such a case this Court may disregard all assignments of error and affirm the judgment below.

Western Assur. Co. vs. Polk, 104 Fed., 649; 44 C. C. A., 104.

The assignment of errors is contained in the transcript at pages 201 to 205. It contains no assignments whatever on the sufficiency of the evidence to support the findings and decision. The first twelve assignments are in relation to the rulings of the Court on admission of evidence. Assignment number thirteen specifies that the Court erred in overruling the motion for a new trial, which is not assignable as error in this Court. Assignment number fourteen insists that the Court erred in dissolving the injunction originally issued. (Tr., p. 204.) This assignment is not referred to in appellant's brief. The three last assignments of error are as follows:

XV.

The Court erred in rendering a decree that Plaintiff's Exhibit No. 2 be reformed by striking out the figure "75" in paragraph 4 thereof, and answering in lieu thereof the figures "25."

XVI

The Court erred in rendering a decree in favor of defendants Chas. F. Magaha and William Elliott, and against the plaintiff Stanley Kuzek.

XVII

The Court erred in not making, rendering and entering a decree in favor of the said plaintiff Stanley Kuzek, and against the defendants Chas. F. Magaha and Wm. Elliott, adjudging that plaintiff was entitled to an accounting of the gold extracted by defendants, and that plaintiff required 75 per cent of the gross proceeds of gold taken by defendants from the premises described in plaintiff's complaint.

That general assignments of this character are insufficient to authorize a review of the evidence is settled by a long line of decisions.

Deering Harvester Co. vs. *Kelly,* 103 Fed., 261; 43 C. C. A., 225.

Smith vs. *Hopkins,* 120 Fed., 921.

United States vs. *Lee Yen Tai,* 113 Fed., 465; 51 C. C. A., 299.

Richardson vs. *Walton,* 61 Fed., 535; 9 C. C. A., 604.

Metropolitan Nat. Bank vs. *Rogers,* 53 Fed., 776; 3 C. C. A., 666.

Sovereign Camp, Woodmen of the World vs. *Jackson,* 97 Fed., 382; 38 C. C. A., 208.

Louisiana A. & M. R. Co. vs. *Board of Levee Comrs., etc.,* 87 Fed., 594; 31 C. C. A., 121.

United States vs. *Ferguson,* 78 Fed., 103; 24 C. C. A., 1.

McFarlane vs. *Golling,* 76 Fed., 23; 22 C. C. A., 23.

Fox vs. *Haarsteck,* 156 U. S., 678.

Appellant's counsel cite the cases of *Ridings et al.* vs. *Johnson,* 128 U. S., 212, and *Central Trust Co.* vs. *Seasongood,* 130 U. S., 482, to the point that on an appeal in an equity suit the whole case is before the Court, and they are bound to decide it in so far as it is in a condition to be decided. We have carefully examined these cases as well as *Buckingham et al.,* vs. *McLean,* 13 How., 150, and although we are not inclined to dispute the proposition made by appellant, the cases cited are not to the point. At any rate, the rule is that in the absence of proper assignments of error the Court will not examine every point in the case. Proper assignments of error are just as necessary in equity as in other cases.

Randolph vs. *Allen,* 73 Fed., 23, 29 (C. C. A.).
Farrar vs. *Churchill,* 135 U. S., 609.

It may also be remarked that in discussing the question of what is before the Court on an appeal in equity, counsel have forgotten their contention that this is an action at law.

IV.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS AND DECISION OF THE COURT CAN NOT BE REVIEWED BECAUSE NO EXCEPTIONS WERE TAKEN OR RESERVED TO THE FINDINGS.

Section 372 of the Alaska Code of Civil Procedure,

referring to the trial of suits of an equitable nature, provides as follows:

"* * * In all such actions the Court, in rendering "its decision therein, shall set out in writing its findings "of fact upon all the material issues of fact presented by "the pleadings, together with its conclusions of law "thereon; but such findings of fact and conclusions of "law shall be separate from the judgment and shall be "filed with the clerk and incorporated in and constitute "a part of the judgment roll of the case; and such find- "ings of fact shall have the same force and effect and be "equally conclusive, as the verdict of a jury in an action. "*Exceptions may be taken during the trial to the ruling* "*of the Court, and also to its findings of fact, and a state-* "*ment of such exceptions prepared and settled as in an* "*action,* and the same shall be filed with the clerk within "ten days from the entering of the decree (judgment) "or such further time as the Court may allow."

Carters Alaska Code, p. 226.

That exceptions to the findings under this section are necessary, see:

8 Ency Pl. & Pr., p. 275, and cases cited, also:
Marks vs. *Crew et al.,* 14 Ore., 382; *S. C.,* 13 Pacific, 55.
Verdier vs. *Bigne,* 16 Pacific, 64, 66 (Oregon).

It must have been intended to require specific excep-

tions to findings to authorize their review in the Appellate Court, otherwise the provisions of this section in relation to the taking of such exceptions would be useless and without meaning.

V.

NO ERROR WAS COMMITTED BY THE COURT IN ITS RULINGS UPON THE ADMISSION OF EVIDENCE.

Before discussing this point we desire to call the attention of the Court to the fact that the brief of appellant contains no specification of the alleged errors in the admission of evidence, as required by the rules of this Court. Under such circumstances, this Court may properly refuse to consider them.

> *Haldane* vs. *United States,* 69 Fed., 819; *16 C. C. A.,* 447.

The first three assignments of error are not mentioned in any part of appellant's brief. As to all the other assignments of error upon the admission of evidence with the exception of assignment No. VI, no attempt is made either in the assignment of errors or in appellant's brief to comply with that part of rule 11 of this Court, which requires that "when the error alleged is to the admission "or to the rejection of evidence, the assignment of errors "shall quote the full substance of the evidence admitted "or rejected." Under such circumstances, this Court is under no obligation to consider these assignments.

Cass County vs. *Gibson,* 107 Fed., 363; *46 C. C. A.,* 341.

Counsel for appellant have so intermingled their argument on all assignments relating to evidence touched upon by them with their argument upon the sufficiency of the evidence that it is difficult to answer them in order.

The first assignment on admission of evidence mentioned by appellant's counsel is No. IV, that the Court erred in permitting the witness Cowden to testify as to his reason for carefully examining the original lease. (Appellant's brief, p. 16; Tr., pp. 69-70.) Counsel cite no authority and give no reason for their "opinion" that the action of the Court was erroneous. In our opinion, no error was committed. As the point of the witness Cowden's testimony was that he remembers the original lease provided for the payment of twenty-five per cent to the lessor and not seventy-five, it was perfectly proper for him to state the reason, if any, why he particularly examined the document with reference to this point.

Appellant's counsel next complain of the admission in evidence of declarations and statements of the witness Kuzek to the effect that he was to receive only twenty-five per cent royalty. It is objected that certain of the conversations took place before the original lease was signed—as an instance, the testimony of the witness Taylor in relation to a statement of Mr. Kuzek the day immediately preceding the execution of the lease. The testimony complained of is set forth on page 17 of appellant's brief. The fact that this admission was made the

day before the execution of the lease is in our opinion of no importance when we consider that it is admitted by the pleadings and by plaintiff in his evidence that the defendants had for several months been operating on an oral lay, and the original lease only put in writing the former oral agreement of the parties. This is a sufficient answer to the suggestion that the parties may have modified their previous oral understanding. Counsel cite no authority for their contention that the admissions of plaintiff testified to by the various witnesses were incompetent. The case of *Marvin* vs. *Bennett et al.*, 26 Wend., 168, does not touch on the competency, but only on the weight and value, to be given such admissions.

It is also complained that error was committed in admitting certain evidence of the usual amount of royalty reserved by lessors in leasing claims of the character and in the same neighborhood as the claim in question. Such testimony was clearly admissible as showing the gross inadequacy of the consideration which would be received by the laymen, if they should receive but 25 per cent of the output. Such testimony is always admissible. "While inadequacy of price, however gross, is not of it-"self sufficient ground to set aside or reform a contract "between parties standing on an equality, it is a material "fact, and in connection with other facts may amount "to proof of fraud or mistake."

Baldwin vs. *National Hedge and Wire Fence Co.*, 73 Fed., 574, 584 (citing *Bigelow Frauds*, 137;

Kerr, Fraud & M., 186; *Story, Eq. Jur.*, sec. 246; *Howard* vs. *Edgell*, 17 Vt., 9.)

A case directly in point is *Gillis* vs. *Arringdale*, 47 S. E., 429 (N. C.)

It is also claimed by appellant that the witness Cowden was not qualified to state the usual amount of royalty. At page 76 of the transcript, he is asked, without objection: "Q. I will ask you if you are familiar "with the usual rate of royalty that is paid upon mines "at and near Peluk creek, of the same kind and character "as the claim in dispute?" To this question he answered: "A. I am." A question almost identical was asked the witness Marsh (Tr., p. 79) and he made like answer.

Appellant also claims (appellant's brief, p. 20) that one witness Johnson did not give any date as to the conversation with Kuzek as to the amount of royalty the defendants were to receive. While no date is given, it appears that it was while the defendants were working under the lease. It therefore follows conclusively that it must have been after the lease was entered into. (Tr., p. 90.) Such a criticism is hypercritical. As to the testimony of the witness Greve, while it is true the conversation was before the written instrument was executed, it was after defendants were at work under the lease which was afterwards reduced to writing.

The evidence of United States Commissioner Reed as to the purpose for which the original lease was brought to him was clearly competent. He testified as to its con-

tents and it was proper to show what examination he made of it. (Tr., p. 93.)

As to the conversation between the witness Taylor and defendant Elliott complained of by appellant on page 21 of his brief, it may be answered that it is not the testimony mentioned in the twelfth assignment of error. This assignment which, however, does not conform to the rules of this Court, reads as follows: "The Court "erred in permitting the defendant Elliott to testify as "to a conversation held between himself, D. M. Taylor "and the plaintiff, as to the terms of the lease, which con- "versation was held before the contract of lease was re- "duced to writing." The evidence referred to by this assignment is not the statement by the witness Taylor: "Sure, I think it will" (Tr., p. 95) as stated on page 21 of appellant's brief, but the following found at page 96 of the transcript:

"Mr. Taylor asked when I would be in town. I told "him possibly the next day. He told me to bring my "lease with me. I told him it wasn't made out yet; that "we just had an oral agreement between us. I said, 'we " 'get 75 per cent of what comes out of the ground up " 'to June 5th; Kuzek can tell you the same,' and Kuzek "says 'that is right; you can get your paper right off " 'and take them up with you.' The next day we reduced "the agreement to writing."

The admissibility of this character ot testimony has already been discussed by us.

We have referred to all the alleged errors in the admission of evidence discussed in appellant's brief and respectfully submit even if properly before the Court they are entirely without merit.

VI.

THE EVIDENCE IS SUFFICIENT TO JUSTIFY THE DECISION OF THE COURT.

Counsel for appellant have discussed the sufficiency of the evidence at considerable length. Representing the appellees, we are at considerable disadvantage in this discussion, owing to the failure of the appellant to include in the bill of exceptions the original unsigned draft of lease, "Plaintiff's Exhibit No. 3" and the photographic copies of this exhibit, and "Plaintiff's Exhibit No. 2." The strongest point made by appellant and stated over and over again in his brief, is that the unsigned draft of lease provided for the payment of 75 per cent to the lessor, and that it was also in the handwriting of defendant Elliott. (Appellant's brief, pp. 23, 30, 31, 33.)

In this contention counsel is in error. Had the learned counsel who filed appellant's brief in this Court been present at the trial in the Court below we believe they would not have pressed this point so insistently. The unsigned draft of lease was partially filled out when defendant Elliott commenced to complete it. It had been partially filled out by the plaintiff Kuzek. (Tr., pp. 101-102.)

Elliott did not write that portion of the original draft of lease which provided for the payment of 75 per cent of the gold to plaintiff. That portion of the draft was afterwards written in by the plaintiff Kuzek in order to make it agree with the duplicate signed copy made in April, and for the express purpose of attempting to make the Court believe that defendant Elliott had twice, in different documents, written the words and figures, "75 per cent to the lessor." The plaintiff Kuzek and his wife both wilfully swore falsely that Elliott had written the words and figures, "75 per cent," in the draft of lease. This false testimony took from their evidence all its credibility. If this Court had before it the original exhibits or the photographs of them, it would be made plain that both plaintiff and his wife had, by reason of ignorance and avarice, committed a very crude forgery and attempted to sustain it by perjury. Owing to the fact that these exhibits are not in the record, no ocular demonstration of this fact can be made to this Court, but it can be shown from some of the testimony in the record.

When the defendant Elliott was being cross-examined the following occurred:

"(Witness was here handed a draft of a lease claimed to have been made on the same day the original lease was executed.)

"Q. At that time did you have this paper, did you see this paper there at that time?

"A. No, that one was never produced at that time.

"Q. I will ask you to look that over.

"A. I remember when that—this was with the first one.

"Q. Who wrote that?

"A. I wrote the lower part.

"Q. Who wrote this here?

"A. I don't know where you mean.

"Q. This writing here where it says, 'Pay to said lessor'—

"A. Let me look at that just a minute please.

"Q. Yes, sir. (Hands witness paper.) Plaintiff's Exhibit No. 3.

"A. There is two figures here I never wrote.

"Q. What are they?

"A. The '75' and this here 'H-e-s.'

"Q. You never wrote that?

"A. I will testify I never wrote that, that is not my figures.

"Q. You are absolutely positive of that?

"A. I am positive that is not my figures."

At the request of plaintiff's attorney, the plaintiff Elliott wrote his name, the word "his," the figures "175" and "1903." These exemplars of his handwriting were introduced in evidence without objection, marked "Plaintiff's Exhibit No. 4." (Tr., p. 64.) As they are not contained in the bill of exceptions it is impossible for this Court to make the comparisons made by the Court below. The omission of this important exhibit further illustrates the impossibility of properly reviewing the evidence in this Court.

On re-direct examination the same witness testified, in relation to the unsigned draft, "I did not write the word 'legal' nor the figures '75' after word assigns." (Tr., p. 62.) He also testified as follows referring to "Plaintiff's Exhibit No. 3":

"Q. After the word 'during,' the balance of the pencil writing before the words 'and that the lessor' did you write that? A. I did; yes, sir.

"Q. The word 'his' before 'legal representatives' in the last line of paragraph IV, did you write that?

"A. It is mine, that is my writing, I always make an 'h' like that, in all my writing, I always write it that way; I never start at the bottom, you never find any word wherever I use 'h' in it where I got it in the other way, I never start it that way unless there are two words together where I would have to run up.

"Q. No I will ask you to state, Mr. Elliott, whether or not the word 'h-e-s' or 'h-e-r,' or whatever that is before—in the fourth paragraph of this so-called draft of the lease, Plaintiff's Exhibit No. 3, the word in pencil writing, immediately before the words 'legal representatives or assigns' was written on the paper that day? A. It was not written in my presence.

"Q. Was the word or figures '75' after the word 'assigns' in the same paragraph written that day?

"A. They were not placed on that by me, and I never saw them there." (Tr., pp. 62-3.)

The plaintiff Kuzek first testified that he did not write the figures 75 in the unsigned draft, Exhibit 3:

"Q. Come down to the word legal in the fourth paragraph; that looks like h-e-s, did you write that?

"A. No, sir.

"Q. You are positive of that?

"A. Positive.

"Q. You are absolutely positive about that?

"A. Yes, sir.

"Q. And this '75' did you write that?

"A. No, sir.

"Q. You are positive of that?

"A. Positive, yes, sir."

(Testimony of Kuzek. Tr., p. 155.)

After having been examined with reference to a note book containing specimens of his handwriting (Tr., pp. 158-164) he changed his testimony and admitted that he might have written the word "h-e-s" and the figures "75" in the unsigned draft. The testimony is as follows:

"Q. You are absolutely sure that you didn't write the word 'h-e-s' immediately before 'legal representatives'?

"A. No.

"Q. You are not absolutely sure. Are you absolutely sure that *you didn't write the figures '75' in the first line of paragraph fourth?*

"A. No, sir."

That these pivotal words were written in the unsigned draft by Kuzek himself could, we claim, be shown conclusively, if the original exhibits or their photographs were before the Court. Counsel say, with reference to the ex-

pert testimony on the question of the handwriting, "as "the photographs of the documents themselves are not "attached to the record, nor the originals before this "Court, the testimony and references to them given by "this witness is obscure and valueless."

Not so, however, to the Court below. Can appellant ask this Court to reverse the findings of the Court below when the evidence which controlled the decision, or may have controlled the decision of the Court below, is not before the Appellate Court? If appellant desired to have this question reviewed he should have brought the necessary documents to this Court.

To sustain the findings of the Court we have the positive evidence of the defendant Elliott (Tr., pp. 41-62), corroborated by his co-defendant, Magaha (Tr., pp. 65-67); the evidence of D. M. Taylor (Tr., pp. 67-68), who saw the original lease and who testified that "it provided a royalty of 25 per cent"; the testimony of C. G. Cowden, cashier of the Alaska Banking and Safe Deposit Company, who also saw, read, and closely examined the original lease, and who also testified that it provided a percentage of 25 per cent to the owner (Tr., p. 69); the testimony of T. M. Reed, United States Commissioner (Tr., p. 93), and Fred Strehlke (Tr., p. 68) to the same effect. We also have the evidence of eleven witnesses who testified to statements by plaintiff that he was to receive but 25 per cent, and a large number of witnesses who testified to the usual rental, showing that the reservation of 75 per cent to the owner would be three times the

usual amount. We also have the expert testimony showing that the figures 75 in the unsigned draft were written by Kuzek (Tr., pp. 97-99).

It is claimed by appellant and very strenuously argued in his brief, that the mistake was due to the negligence of Elliott, and for that reason he should be denied relief. While it is true that equity has many times refused relief where a mistake was caused wholly by the negligence of the complaining party, the books are full of cases where carelessness on his part will not necessarily prevent him from obtaining relief in a court of equity. It will be borne in mind that it was fully proved in the Court below that there was no mistake in the original lease; that it provided for the payment of 25 per cent to plaintiff Kuzek. A mistake in making what was intended to be a duplicate could not in any way affect the validity of the original. Neither can it be said that a mistake by defendant Elliott in copying was negligence as a matter of law. It is alleged in the answer that the mistake was "inadvertently" made by the defendant Elliott in copying the original lease (Tr., p 16. It was claimed by the appellant's counsel in the trial court that "inadvertence" and "negligence" were synonymous terms, it being so stated in our best dictionaries, and that equity would in no case relieve a person from the consequences of inadvertence. That equity will relieve from mistakes inadvertenly made is, however, settled by many authorities.

Thompson vs. *Phenix Ins. Co.*, 136 U. S., 287, 296.
Wasatch Min. Co. vs. *Crescent Min. Co.*, 148 U. S., 293, 298.
Colton et al. vs. *Lewis et al.*, 119 Ind., 181.

In *Thompson* vs. *Phenix Ins. Co.*, just cited, speaking of the reformation of an insurance policy, the Court said: "If by *inadvertence*, accident or mistake, the terms "of the contract were not fully set forth in the policy, "the plaintiff is entitled to have it reformed * * * "

Can it be said that the inadvertence of Elliott in incorrectly copying the original lease was culpable negligence? Are not mistakes in copying frequently made by very careful persons?

Mistake has been defined as follows: "Mistake may "be said to be some unintentional act, omission or error "arising from unconsciousness, ignorance, forgetfulness, "imposition or misplaced confidence."

Kerr on Fraud and Mistake, p. 396.

The same author further says (p. 407): "What is the "nature or degree of mistake which is relievable in "equity as distinguished from mistake which is due to "negligence and therefore not relievable, cannot well be "defined so as to establish a general rule, *and must in a "great measure depend on the discretion of the Court "under all the circumstances of the case.*"

Pomeroy in his work on Equity Jurisprudence says:

"It has sometimes been said that a mistake resulting

"from a complaining party's own negligence will never "be relieved. This proposition is not sustained by the "authorities. It would be more accurate to say that "where the mistake is wholly caused by the want of that "care and diligence in the transaction which should be "used by every person of reasonable prudence, and the "absence of which would be a violation of legal duty, a "court of equity will not interpose its relief; but even "with this more guarded mode of statement each in- "stance of negligence must depend to a great extent upon "its own circumstances. It is not every negligence that "will stay the hand of the Court. The conclusion from "the best authorities seems to be, that the neglect must "amount to the violation of a positive legal duty. The "highest possible care is not demanded. Even a clearly "established negligence may not of itself be a sufficient "ground for refusing relief if it appears that the other "party has not been prejudiced thereby."

2 Pomeroy's Eq. Jur., sec. 856. (3d ed.)

A case very much in point is *Russell* vs. *Mixer,* 42 Cal., 475. It was there held, quoting the syllabus: "Equity "will grant relief against a mistake by which parties, "through their own ignorance or inattention, fail to se- "lect or prepare a proper kind of instrument to effect- "uate their agreement and intention, the same as if such "mistake were made by a scrivener."

Among examples of cases where a certain degree of

carelessness or inattention was held not to bar relief may be cited the following:

Wilson vs. *Moriarity,* 88 Cal., 207, 26 Pac., 85.
Monroe vs. *Skelton,* 36 Ind., 302.
Schautz vs. *Keener,* 87 Ind., 258.
Baker vs. *Pyatt,* 108 Ind., 61, 9 N. E., 112.
Keister vs. *Myers,* 115 Ind., 312, 17 N. E., 161.
Snyder vs. *Ives,* 42 Iowa, 157.
Miller vs. *Small,* 10 S. W., 810 (Ky.)
Hitchins vs. *Pettingill,* 58 N. H., 3.
Albany City Sav. Inst. vs. *Burdick,* 87 N. Y., 40.
Paisley vs. *Casey,* 18 N. Y. Supp., 102.

Counsel for the appellant have cited and quoted from a large number of cases in relation to the amount of proof required to show mistake. With most of these authorities we have no quarrel, but notwithstanding the rule stated in many ways that very strong proof is required, the testimony need not be free from conflict.

If the proofs of mistake are entirely plain and satisfactory, relief by way of reformation will be granted though the mistake is denied and there is a conflict of testimony.

Baldwin vs. *Nat. Hedge & Wire F. Co.,* 73 Fed., 574; 19 *C. C. A.,* 575.

"Relief, however, is not denied because there is con-
"flicting testimony, for that would result in a denial of
"justice in some of the plainest cases."

Same citation, citing *Beach Eq. Jur.,* Sec. 546.

A recent case decided by this Court states the rule in cases of mistake as follows:

"We find in the evidence no ground for saying that "the trial court disregarded the rule that in each case "the burden rests upon the moving party of overcoming "the strong presumption arising from the terms of a "written instrument, and that if the proofs are doubtful "and unsatisfactory and there is a failure to overcome "the presumption by testimony entirely plain and con- "vincing beyond reasonable controversy, the writing "will be held to express correctly the intention of the "parties. *Nearly all the testimony was taken in open "court and the judge who heard the case had the oppor- "tunity to observe the demeanor of the witnesses and to "judge concerning their credibility.* There was testi- "mony *to the effect that Conrad Siem had prior to the "commencement of the suit expressly admitted the mis- "take. Findings of fact so made on conflicting evidence "cannot be reviewed by this Court unless a serious and "important mistake appears to have been made in the "consideration of the evidence, or an obvious error has "intervened in the application of the law. This rule is "so firmly established by the decisions of this and other "courts as to require no citation of authorities."*

Shields vs. *Mongollon Co.*, 137 Fed., 539, 546.

That the judge of the court below gave full consideration to the rules in relation to the amount and kind of proof required in cases of this kind is apparent from his

opinion finding "that the allegations of the defendant's "answer as to the terms of the original lease have been "*clearly and convincingly* sustained by the evidence" (Tr., p. 182).

Appellant's criticism of the opinion of the Court below that it finds "That the allegations of plaintiff's complaint have not been sustained by the evidence," while certain facts alleged therein, such as the ownership of the claim in question, were admitted by defendants, is captious and without merit (Appellant's Brief, p. 30). It is too plain for argument that the Court referred only to the allegations of fact put in issue.

It is respectfully submitted that the decision of the Court below was right upon both law and fact and was consonant with justice and equity and should be affirmed.

J. C. CAMPBELL,
W. H. METSON,
F. C. DREW,
C. H. OATMAN,
IRA D. ORTON,
Attorneys for Appellees.

No. 1224

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

TRANSCRIPT OF RECORD.

Upon Appeal from the Circuit Court of the United States for the District of Oregon.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

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In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

Case No. 2658.
July 6th, 1905.

Order Enlarging Time to File Transcript.

Upon stipulation of parties herein by their respective attorneys—

It is ordered that the time of defendant in which to file the transcript on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged thirty days.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: No. 1224. United States Circuit Court of Appeals, for the Ninth Circuit. Oregon and California Railroad Company vs. United States. Order under Rule 16. Filed July 17, 1905. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, Complainant and Appellee, vs. OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant and Appellant.	Case No. 2658.

Citation.

To the United States of America, Greeting:

The Oregon and California Railroad Company having, on this day, been granted an order of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered on December 12, 1904, and amended decree made and entered herein February 25, 1905, in Suit No. 2658, in the Circuit Court of the United States for the District of Oregon, brought by the United States of America as complainant against the said company; and the bond on appeal of the said company having been this day filed and approved:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on July 9th, 1905, to show cause if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, on June 9th, 1905.

WM. B. GILBERT,
Judge.

State of Oregon,
County of Multnomah, } ss.

Due service of the within citation is hereby accepted at Portland, Oregon, on June 9th, 1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney, of Attorneys for Complainant.

[Endorsed]: Original. No. 2658. United States Circuit Court of Appeals, Ninth Circuit. United States of America vs. Oregon and California Railroad Company. Citation. United States Circuit Court. Filed, June 9, 1905. J. A. Sladen, Clerk.

In the Circuit Court of the United States, for the District of Oregon.

October Term, 1900.

Be it remembered, that on the 25th day of February, 1901, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, Sitting in Equity.

The United States of America by John W. Griggs, its Attorney General, brings this its bill of complaint against the Oregon and California Railroad Company, a corporation organized under and by virtue of the laws of the State of Oregon, and a citizen of said State and District, and complaining says:

I.

That the Congress of the United States by an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, Oregon," approved July 25th, 1866, authorized such company, organized under the laws of Oregon, as the legislature of

said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, and running thence through the Willamette, Umpqua, and Rogue River Valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon Company every alternate section of public lands of the United States, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, ten on each side of said railroad; and when any of said alternate sections or parts of sections, should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections; and as soon as the said company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad so far as located, and within the limits above specified. And your orator would further show that by joint resolution, adopted October 20th, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was

designated in accordance with the said last-mentioned Act of Congress, as capable of receiving and undertaking the privileges, franchises, grants and duties above set forth and did become the corporation entitled to all the benefits and subject to all the obligations, of said Act of Congress, and that on or about April 4th, 1870, the said Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, became the successor and assign of said Oregon Central Railroad Company.

II.

And your orator would further show unto your Honors, that on the 26th day of March, 1870, the officers of the Oregon and California Railroad Company definitely fixed the line of the first sixty miles of said road authorized by said Act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office, and presented same to the then Secretary of the Interior showing among other things a route along the line authorized by said Act of Congress, approved July 25th, 1866, and the following described, among other lands in the State of Oregon, were odd-numbered sections, or parts of sections of land, not mineral, within the place limits of said proposed line of railroad as designated by said map, viz.:

The S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian, amounting in all to 360 acres of land, being situated within the State of Oregon.

III.

And your orator would further show unto your Honors, that on the 29th day of September, 1866, Alfred Jones was a duly qualified entryman as a pre-emptioner under the laws of the United States; that on the 29th day of September, 1866, he duly filed at the land office at Oregon City, Oregon, his declaratory statement No. 1845, alleging settlement thereon on the 18th day of September, 1866, with a bona fide intent to then and there acquire title under the pre-emption laws of the United States to the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ the S. E. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian, which said land was then and there public lands of the United States, and subject to pre-emption entry thereunder; that said entry and filing were made prior to the date upon which the defendant filed with the Secretary of the Interior its map of definite location of the line of said road opposite to and coterminus with said tract of land; that by the terms of the grant to defendant's predecessor the title to the said land did not pass thereunder but remained in the United States.

IV.

And your orator would further show unto your Honors, that on the 13th day of November 1868, Robert Welch was a duly qualified entryman as a pre-emptioner under the laws of the United States; that on the said 13th day of November, 1868, he duly filed at the land office at Oregon City, Oregon, his declaratory state-

ment No. 2202 alleging settlement thereon on November 4th, 1868, with a bona fide intent to then and there acquire title under the pre-emption laws of the United States to the S. W. ¼, N. E. ¼ of S. ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼, Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian, which said tract of land was then and there public lands of the United States and subject to pre-emption entry thereunder; that said settlement and filing was made prior to the date upon which the defendant the Oregon and California Railroad Company filed with the Secretary of the Interior of the United States its map of definite location of the line of said road opposite to and coterminus with said tract of land; that by the terms of the grant to defendant's predecessor the title to said land did not pass thereunder, but remained in the United States.

V.

And your orator would further show unto your Honors, that on the 8th day of February, 1869, Mathew Darr was a duly qualified entryman as a pre-emptioner under the laws of the United States; that on the said 18th day of February, 1869, he duly filed his declaratory statement at the land office at Oregon City, Oregon, No. 2231 alleging settlement thereon November the 6th, 1868, with a bona fide intent to then and there acquire title under the pre-emption laws of the United States to the S. W. ¼ of the N. E. ¼, and the S. ½ of the N. W. ¼, and the N. E. ¼, of the S. W. ¼ of Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian, which said lands were

then and there public lands of the United States and subject to pre-emption entry under the laws thereof; that said settlement and filing was made prior to the date upon which the defendant, the Oregon and California Railroad Company, filed with the Secretary of the Interior of the United States its definite line of location of said road opposite to and coterminous with said tract of land; that by the terms of the grant to defendant's predecessor the title to said land did not pass thereunder but remained in the United States.

VI.

And your orator would further show unto your Honors, that on the 6th day of December, 1869, John W. Jackson, was a duly qualified entryman under the homestead laws of the United States; that on the said 6th day of December, 1869, he duly filed at the land office at Oregon City, Oregon, his homestead entry No. 1383 for the S. E. ¼ of the N. E. ¼, the E. ½ of the S. E. ¼ and S. W. ¼ of the S. E. ¼ of Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian with a bona fide intent to acquire title thereto under the homestead laws of the United States; that said lands were then and there public lands of the United States and subject to entry under the homestead laws thereof; that said filing was made prior to the date upon which the defendant the Oregon and California Railroad Company filed its map of definite location opposite to and coterminus with said lands with the Secretary of the Interior of the United States; that the title to said lands did not pass

to defendant by reason of the terms of the grant to defendant's predecessor of July 25th, 1866, but that said title remained in the United States.

VII.

And your orator would further show unto your Honors, that on the 12th day of July, 1871, the President of the United States without knowledge of the adverse claim of Alfred Jones, Robert Welch, Mathew Darr and John W. Jackson issued to defendant the Oregon and California Railroad Company a patent for the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian.

VIII.

And your orator would further show unto your Honors, that on the 18th day of July, 1877, the President of the United States without knowledge of the adverse claim of said Alfred Jones, Robert Welch, Mathew Darr and John W. Jackson issued to defendant the Oregon and California Railroad Company a patent for the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S, E. $\frac{1}{4}$ of Sec. 35, T. 4 S., R. 3 E. of the Willamette meridian.

But your ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing said patents for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that defendant company still claims title

to said lands under said patent and withholds said lands from your orator.

IX.

And your orator would further show unto your Honors, that the Congress of the United States by an Act entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3d, 1887, directed and authorized the Secretary of the Interior to adjust all grants theretofore unadjusted, and if it should appear that any lands had been erroneously patented to any railroad company, to make demand for relinquishment or reconveyance, that if such company should refuse to reconvey within ninety days, then it should be the duty of the Attorney General to commence and prosecute in the proper Court the necessary proceedings to cancel such patents and restore title to the United States. And your orator avers that on the 28th day of July, 1900, the total grant of lands in the State of Oregon under said grant of July 25th, 1866, to said Oregon Central Railroad Company to the rights of which the said Oregon and California Railroad Company had succeeded as aforesaid, was unadjusted and the Secretary of the Interior regarding the said patents to the above-described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute, and in accordance with such direction the Commissioner of the General Land Office did on the 11th day of Septem-

ber, 1900, make demand on said railroad company, by letter addressed to William H. Mills, land agent of the Oregon and California Railroad Company, controlling the grant for said Oregon and California Railroad Company for reconveyance of said above-described lands. And your orator avers that said demand has been refused, and that said defendant company has refused and still refuses to so reconvey said lands.

X.

And your orator would further show unto your Honors on information and belief, that the defendant the Oregon and California Railroad Company claims to have sold to bona fide purchasers some of the lands hereinbefore described; that the value of the lands hereinbefore set forth and described, is the sum of $2.50 per acre.

XI.

And your orator would further show unto your Honors, that if it shall be made to appear by answer of defendant, or intervention of parties interested or otherwise to your Honorable Court that any of said lands have been sold and conveyed to bona fide purchasers, and that the title of said bona fide purchaser or purchasers to said lands shall be confirmed, that the plaintiff shall recover of and from defendant the Oregon and California Railroad Company the sum of $2.50 per acre for all of said lands so sold and conveyed to said bona fide purchasers.

XII.

And your orator would further show unto your Honors that on account of the complexity of the matters to be inquired into, and as your orator is entirely remediless according to the strictest rules of the common law, and for the purpose of avoiding a multiplicity of suits, your orator brings this suit into this court, where matters of this kind are properly cognizable and relievable.

Forasmuch, therefore, as your orator can have no adequate relief except in this court, and to the end, therefore, that the said defendant may (complainant hereby waiving the necessity of an answer by said defendant company, but not under oath), to the best and utmost of its respective knowledge, remembrance and belief, full, true, direct and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written it is required to answer, that is to say:

1. Whether any of the lands described herein have been sold to bona fide purchasers?

2. What lands, if any, herein set forth have been sold, if sales were had?

3. To whom were the lands sold, and what were the true terms of the sale, whether for cash or on deferred payments?

And your orator prays also that the moneys received by the defendant for any of the lands described herein upon sales thereof be declared to be moneys and property of the United States; and a decree that they were

held in trust by defendant, for the complainant, and that such money, to the extent of $2.50 per acre, for the lands erroneously taken be paid to complainant, and that the lands not sold by defendant be declared to be lands of the United States, and the patents thereto be decreed to be null and void, and that your orator shall have such other and further relief as the case may require, and as shall seem meet to the Court, and as shall be agreeable to equity and good conscience.

And may it please your Honors to grant unto your orator a writ of subpoena directed to the said Oregon and California Railroad Company commanding it to appear and answer unto this bill of complaint, but not under oath (an answer under oath being hereby expressly waived), and to abide and perform such order and decree in the premises as to the Court shall seem meet and be required by the principles of equity and good conscience.

JOHN W. GRIGGS,
Attorney General of the United States.

JOHN H. HALL,
United States Attorney for the District of Oregon.

Filed February 25, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 25th day of February, 1901, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2658.

Subpoena ad Respondendum.

The President of the United States of America, to The Oregon and California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in the city of Portland, in said District, on the first Monday of April next, which will be the first day of April, A. D. 1901, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The United States of America is complainant, and you are defendant, and

further to do and receive what our said circuit court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ or subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of February, in the year of our Lord, one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

[Seal] J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

United States of America,
District of Oregon. } ss.

I hereby certify that on the 26th day of February, 1901, at Portland, Multnomah County, in said District, I duly served the within subpoena ad respondendum upon the within named Oregon and California Railroad Company, by delivering to one R. Koehler, second vice-president of said company, personally a true copy of said subpoena ad respondendum duly certified to by J. A. Sladen, clerk of United States Circuit Court, together with a copy of the bill of complaint in the within entitled suit certified to be a true copy, by John H. Hall, United States Attorney for said District.

ZOETH HOUSER,
United States Marshal for said District,
By J. A. Wilson,
Deputy.

Marshal's Fees, $4.12.

Returned and filed February 28, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 28th day of March, 1901, there was duly filed in said court, a praecipe for appearance of defendant, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Praecipe for Appearance of Defendant.

The clerk of the Circuit Court of the United States for the District of Oregon will please enter appearance of the defendant Oregon and California Railroad Company, in the above-entitled action, by

WM. D. FENTON, and
WM. SINGER, Jr.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

Filed and entered March 28th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 28th day of March, 1901, there was duly filed in said court, a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until June 3d, 1901, to file its plea, demurrer or answer to the complainant's bill, in the above-entitled case; and the clerk of the said Court will please procure and enter a proper order, accordingly.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON,
Of Attorneys for Defendant.

Filed March 28th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 29th day of May, 1901, there was duly filed in said court, a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until July 1st, 1901, to file its plea, demurrer or answer to the complainant's bill, in the above-entitled case; and the clerk of the said Court will please procure and enter a proper order accordingly.

JOHN H. HALL,
United States Attorney for Oregon.

WM. D. FENTON,
Of Attorneys for Defendant.

Filed May 29, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Friday, the 31st day of May, 1901, the same being the 46th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY.

Case No. 2658.
May 31, 1901.

Order Extending Time to Plead.

Now at this day comes the plaintiff herein by Mr. John H. Hall, United States Attorney, and the defendant by Mr. R. A. Leiter, of counsel, and thereupon, on motion of said defendant and upon stipulation of the parties hereto filed herein, it is ordered, that said defendant be, and it is hereby, allowed until Monday, July 1st, 1901, in which to file its answer or otherwise to plead herein.

Afterwards, to wit, on the 25th day of June, 1901, there was duly filed in said court a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until August 5th, 1901, to file its plea, demurrer or answer to the complainant's bill, in the above-entitled case; and the clerk of the said court will please procure and enter a proper order accordingly.

JOHN H. HALL,
United States Attorney for Oregon.

Filed June 25th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 5th day of August, 1901, there was duly filed in said court, an answer, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Answer.

The answer of the defendant, Oregon and California Railroad Company, to the complainant's bill of complaint herein.

The defendant, Oregon and California Railroad Company, now and at all times saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties or imperfections in the said bill of complaint, for answer thereto, or to so much thereof as the defendant is advised it is material or necessary for it to make answer to, answering:

Sub. I.

Par. 1. The defendant admits, and alleges, that the Congress of the United States, by an Act entitled "An

Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved on July 25th, 1866, authorized and empowered such company organized under the laws of Oregon as the legislature of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly, through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, where the same should connect with another railroad which the said Act authorized to be constructed in the State of California. That the said Act also granted unto such Oregon company its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and provided that when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections. And the said Act further provided, that as soon as the said company should file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion

thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale the public lands by the said Act granted, on each side of the railroad so far as located; and that whenever the said company had twenty or more consecutive miles of any portion of the said railroad ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same, and if it should appear that twenty consecutive miles of railroad had been completed and equipped in all respects as required, the said commissioners should so report under oath to the President of the United States, and thereupon patents should issue to the said company for the lands granted, to the extent of and coterminous with the completed section of said railroad.

Par. 2. The defendant admits, and alleges, that the Oregon Central Railroad Company is, and ever since April 22d, 1867, has been, a corporation duly organized and existing under the laws of the State of Oregon. That the legislature of the State of Oregon, by Joint Resolution, entitled "Senate Joint Resolution No. 16, Relating to the Railroad Land Grant from the Central Pacific Railroad in California, to Portland, Oregon," adopted March 20th, 1868, duly designated the said Oregon Central Railroad Company as the railroad company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred, by the said Act of July 25th, 1866.

Par. 3. The defendant admits, and alleges, that it is, and ever since March 17th, 1870, has been, a corporation duly organized and existing under the laws of the State of Oregon; and admits and avers that on April 4th, 1870, it became, ever since has been, and now is, the successor and assignee of the Oregon Central Railroad Company, and entitled to all the privileges, benefits and grants in Oregon, provided by the said Act of July 25th, 1866.

Par. 4. The defendant alleges that during the year 1869, and within the time allowed by the Act of Congress, approved April 10th, 1869, entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six," the said Oregon Central Railroad Company duly filed in the department of the interior its assent to the said Act of Congress of July 25th, 1866.

Par. 5. The defendant alleges, that on October 29th, 1869, the said Oregon Central Railroad Company filed in the office of the Secretary of the Interior, and on January 29th, 1870, the Secretary of the Interior accepted and approved, a map of the definite location and survey of the first section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from Portland to a point at or near Jefferson, and comprised not less than sixty continuous miles from the northern terminus thereof.

Par. 6. The defendant alleges that on March 26th,

1870, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the second section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point at or near Jefferson, to a point near the southeast corner of section 35, in township 27 south, range 6 east, Willamette meridian, and comprised not less than one hundred and twenty continuous miles of railroad from Jefferson; that on January 7th, 1871, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the third section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point near the southeast corner of section 35, in township 27 south, range 6 west, to section 30, in township 30 south, range 5 west; that on April 6th, 1822, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, an amended map of the definite location and survey of the said third section of railroad, which amended line of railroad extended from a point in section 28, township 29 south, range 5 west, to Station 1320+50 in section 6, township 30 south, range 5 west; that on April 6th, 1882, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and

approved, a map of the definite location and survey of the fourth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 1320+50 in section 6, township 30 south, range 5 west, to Station 2376+50 in township 31 south, range 7 west; that on July 27th, 1882, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the fifth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 2376+50 in township 31 south, range 7 west, to a point in section 33, township 34 south, range 6 west; that on June 6th, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the sixth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point in section 33, township 34 south, range 6 west, to a point in section 21, township 36 south, range 3 west; that on July 3d, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior duly accepted and approved, a map of the definite location and survey of the seventh section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point in section 21, township

36 south, range 3 west, to the south line of section 32, township 37 south, range 1 west; that on September 6th, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted, a map of the definite location and survey of the eighth section of the railroad in Oregon provided for by the said Act of July 25th, 1886, which section of railroad extended from the south line of section 32, township 37 south, range 1 west, to the east line of section 25, township 39 south, range 1 east; that on August 2d, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the ninth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the east line of section 25, township 39 south, range 1 east, to the north line of section 30, township 40 south, range 3 east; and that on August 20th, 1884, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the tenth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the north line of section 30, township 40 south, range 2 east, to the southern line of the State of Oregon, in section 13, township 41 south, range 1 east.

Par. 7. The defendant alleges, that the Commis-

sioner of the General Land Office, under direction of the Secretary of the Interior, withdrew all odd-numbered sections of land within thirty miles on each side of the line of railroad shown on the maps set forth and described in "Par. 6" hereof, from sale or location, preemption or homestead entry, on the following dates: Opposite and coterminous with, the said first section of railroad, on January 31st, 1870; opposite, and coterminous with, the said second section of railroad, on April 7th, 1870; opposite, and coterminous with, the said third section of railroad, on March 31st, 1871; opposite, and coterminous with, the said amended section of railroad, on July 5th, 1883; opposite, and coterminous with, the said fourth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said fifth section of railroad, on July 5th 1883; opposite, and coterminous with, the said sixth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said seventh section of railroad, on September 3d, 1883; opposite, and coterminous with, the said eighth section of railroad, on October 27th, 1883; opposite and coterminous with, the said ninth section of railroad, on October 27th, 1883; and opposite, and coterminous with, the said tenth section of railroad, on December 19th, 1884. And the defendant alleges that the said withdrawals by the Commissioner have, each and all, remained in full force and effect from the date thereof continuously to and including the present time, except in so far as, if at all, they have been affected by an order of the Secretary of the Interior, made on August 15th, 1887, declaring

said withdrawals revoked as to the odd-numbered sections within the indemnity limits of the grant made by the said Act of July 25th, 1866.

Par. 8. The defendant alleges that the entire railroad contemplated and provided for by the said Act of July 25th, 1866, along the lines shown on the maps set forth and described in "Par. 6" hereof, was constructed in several sections and fully equipped in all respects as required by the said Act of July 25th, 1866, by the said Oregon Central Railroad Company and this defendant; and Commissioners, duly appointed by the President of the United States for that purpose, duly examined the said railroad as completed and equipped in the several sections aforesaid, and duly reported to the President of the United States, under oath, that each of said sections of railroad had been completed and equipped in all respects as required by the said Act of Congress, and that the same was and were ready for the service contemplated by the said Act; which reports were duly accepted and approved by the President of the United States. The said reports were so made, accepted and approved, on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made on July 5th, 1870; accepted and approved on February 28th, 1871; third twenty miles and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; fifth twenty miles, report made on August 11th, 1871, accepted and approved on March

11th, 1872; sixth twenty miles, report made on January 13th, 1872, accepted and approved on March 11th, 1872; seventh, eighth and ninth sections, including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved on July 11th, 1878; from Roseburg to the south boundary line of Oregon, in several sections, reports made and approved as the railroad was completed and examined in sections, during the years 1873 to 1889.

Sub. II.

Par. 9. The defendant admits that the first sixty miles of its railroad was definitely fixed and a plat thereof duly filed, but denies that the date thereof was or is March 26, 1870, as alleged in the bill of complaint herein, and alleges that the true particulars in this behalf are as set forth in Sub. I, Par. 5, of this answer; and the defendant admits that all the lands described in subdivision II of the bill of complaint herein, are odd-numbered sections, or parts of odd-numbered sections, of land, not mineral, within the primary limits of the land grant made by the said Act of July 25th, 1866.

Sub. III.

Par. 10. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision III of the bill of complaint herein, are as follows: The SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ (not SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, as erroneously set forth in subdivision III of the bill of complaint), NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of section 35, township 4 south, range 3 east,

are parts of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and are opposite and coterminous with the section of this defendant's railroad which was definitely located on October 29th, 1867, the construction of which was finally accepted and approved on January 29th, 1870. On September 29th, 1866, pre-emption declaratory statement No. 1845, in the name of Alfred Jones, was filed for the said land in the United States land office at Oregon City, Oregon; but the said lot was never pre-empted, in pursuance of the said filing, or otherwise. But the defendant denies that the said land was public land subject to pre-emption entry at any time after July 25th, 1866, and denies that by the terms of the grant made by the said Act of July 25th, 1866, the said land did not pass thereunder, but remained in the United States. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act, and whatsoever title the United States held for the same at any time after approval of the said granting Act was held in trust for this defendant and its predecessor in interest, the Oregon Central Railroad Company.

Par. 11. The defendant has no knowledge nor information as to the matters and things set forth in subdivision III of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint are in any wise true.

Sub. IV.

Par. 12. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision IV of the bill of complaint herein, are as follows: The SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ (not SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, as erroneously set forth in subdivision IV of the bill of complaint) of section 35, township 4 south, range 3 east, are parts of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and are opposite and coterminous with the section of this defendant's railroad which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. On November 13th, 1868, pre-emption declaratory statement No. 2202, in the name of Robert Welch, was filed for the said land in the United States land office at Oregon City, Oregon; but the said land was never pre-empted, in pursuance of the said filing, or otherwise. But the defendant denies that the said land was public land subject to pre-emption entry at any time after July 25th, 1866, and denies that by the terms of the grant made by the said Act of July 25th, 1866 the said land did not pass thereunder, but remained in the United States. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act, and whatsoever title the United States held for the same at any time after approval of the said

granting Act, was held in trust for this defendant and its predecessor in interest, the Oregon Central Railroad Company.

Par. 13. The defendant has no knowledge nor information as to the matters and things set forth in subdivision IV of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any such matters and things, as set forth in the bill of complaint are in anywise true.

Sub. V.

Par. 14. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision V of the bill of complaint herein, are as follows: The SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of section 35, township 4 south, range 3 east, are parts of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and are opposite and coterminous with the section of this defendant's railroad which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. On February 18th, 1869, pre-emption declaratory statement No. 2202 in the name of Matthew Darr, was filed for the said land in the United States Land Office at Oregon City, Oregon; but the said land was never pre-empted, in pursuance of the said filing, or otherwise. But the defendant denies that the said land was public land subject to pre-emption entry at

any time after July 26th, 1866, and denies that by the terms of the grant made by the said Act of July 25th, 1866, the said land did not pass thereunder, but remained in the United States. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act, and whatsoever title the United States held for the same at any time after approval of the said granting Act, was held in trust for this defendant and its predecessor in interest, the Oregon Central Railroad Company.

Par. 15. The defendant has no knowledge nor information as to the matters and things set forth in subdivision V of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Sub. VI.

Par. 16. The defendant admits that the SE. ¼ of NE. ¼, E. ½ of SE. ¼ and SW. ¼ of SE. ¼ of section 35, township 4 south, range 3 east, was covered by homestead No. 1383, in the name of John W. Jackson, filed in the proper land office of the United States on December 6th, 1869; but alleges, on information and belief, that the said Jackson did not occupy the said land as a homestead settler, or otherwise at the date its (defendant's) railroad was definitely located opposite and coterminous with, the said land. The defendant denies that the said land was public land subject to homestead

entry at any time after July 26th, 1866, and denies that by the terms of the grant made by the said Act of July 25th, 1866, the said land did not pass thereunder, but remained in the United States. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act, and whatsoever title the United States held for the same at any time after approval of the said granting Act, was held in trust for this defendant and its predecessor in interest, the Oregon Central Railroad Company.

Par. 17. The defendant has no knowledge nor information as to the matters and things set forth in subdivision VI of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Sub. VII.

Par. 18. The defendant admits that on July 12th, 1871, the proper officers of the United States issued to it (defendant) a patent for the lands described in subdivision VII of the bill of complaint herein; but alleges that the NW. ¼ of SW. ¼ of section 35, included in said description, is nowise involved in this suit. The defendant denies that Alfred Jones, Robert Welch, Matthew Darr or John W. Jackson, either or any of them, had an adverse claim to the said land, or any part thereof, at the time, or before, said patent issued, or that the President of the United States issued said

patent without knowledge of the said filings of Alfred Jones, Robert Welch, Matthew Darr and John W. Jackson.

Sub. VIII.

Par. 19. The defendant admits that on July 18th, 1877, the proper officers of the United States issued to it (defendant) a patent for the lands described in subdivision VIII of the bill of complaint herein. But the defendant denies that Alfred Jones, Robert Welch, Matthew Darr or John W. Jackson, either or any of them, had an adverse claim to the said land, or any part thereof, at the time, or before, said patent issued, or that the President of the United States issued said patent without knowledge of the said filings of Alfred Jones, Robert Welch, Matthew Darr and John W. Jackson. The defendant denies that the United States acted mistakenly, erroneously, or contrary to the law in issuing the said patent, or that the said patent is void; but admits that it (defendant) and its grantees and successors in interest hereinafter mentioned, claim title to the said land under the said grant and patent.

Sub. IX.

Par. 20. The defendant alleges that, including all the lands described in the bill of complaint herein, it (defendant) has not received the full quantity of land provided in the grant made by the said Act of July 25th, 1866.

Sub. X.

Par. 21. The defendant denies that on September 11th, 1900, or at any time, the Commissioner of the

General Land Office made demand on it (defendant) by letter addressed to William H. Mills, or otherwise, for reconveyance of any land described in the bill of complaint herein; but as to the other matters and things set forth in subdivision IX of the bill of complaint (other than the Act of Congress there referred to) this defendant has no knowledge or information, and on that ground denies that such matters and things are in anywise true, as set forth in the bill of complaint.

Sub. XI.

Par. 22. The defendant denies that the value of the lands described in the bill of complaint is $2.50 per acre, or any sum in excess of $1.25 per acre. But the defendant admits, and alleges, that it has sold to bona fide purchasers all of the lands described in the bill of complaint, as follows: On June 19th, 1878, by deed bearing that date, this defendant sold and conveyed the SW. ¼ of NE. ¼ and SE. ¼ of NW. ¼ of the said section 35, unto George Welch; and on or about December 28th, 1887, this defendant sold and by deed conveyed the SE. ¼ of NE. ¼, SW. ¼ of NW. ¼, SE. ¼, and NE. ¼ of SW. ¼ of said section 35, unto S. W. R. Jones. That each of the said sales and purchases were made in good faith, for full value of the lands sold in hand paid at the date of the said deeds without notice to or knowledge of this defendant or either of the said purchasers that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said lands, or any part thereof, and each of the said purchasers was and is a bona fide purchaser of the lands so purchased.

Sub. XII.

Par. 23. The defendant denies that the complainant is entitled to recover from it (defendant) the sum of $2.50 per acre, or any other sum, for any lands described in the bill of complaint and sold by it (defendant) to bona fide purchasers; and the defendant alleges, upon information and belief, that this court has no jurisdiction of any demand for judgment in money, sought to be made by the bill of complaint herein.

Sub. XIII.

Par. 24. The defendant denies that there is any complexity in or of matters to be inquired into herein; and denies that on account of the complexity of the matters to be inquired into, or on any account, complainant is remediless according to the rules of the common law; and denies that for such reasons, on such account and for, or for the purpose of avoiding a multiplicity of suits, the complainant brought this suit in this court. And in this behalf the defendant alleges, on information and belief, that this court has no jurisdiction of any matters and things set forth in the bill of complaint, except in so far as such matters and things relate to the cancellation of patents for lands which have not been sold by this defendant to bona fide purchasers; and as to all other matters and things set forth in the bill of complaint in so far as, if at all, they state or make out any cause or causes of action, the complainant has a complete, speedy and adequate remedy by a single action of law.

Sub. XIV.

Par. 25. And the defendant denies all and all manner of matter, cause, or thing in the complainant's said bill contained, material or necessary for it to make answer to and not herein well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of the defendant. All of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court may direct; and the defendant prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

District of Oregon, }
Multnomah County. } ss.

Geo. H. Andrews makes solemn oath and says: I am secretary of the Oregon and California Railroad Company, the defendant named in the foregoing answer. I have read the foregoing answer and know the contents thereof, and the same is true of my knowledge, except as to the matters therein stated on information and belief and as to such matters I verily believe the answer to be true.

GEORGE H. ANDREWS.

Subscribed and sworn to before me on August 5th, 1901.

R. A. LEITER,
Notary Public for Oregon.

State of Oregon,
County of Multnomah. } ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 5th day of August, 1901, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, of atttorneys for defendant.

JOHN H. HALL,
Attorney for Complainant.

Filed August 5th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 8th day of August, 1901, there was duly filed in said court, a replication, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

UNITED STATES,
Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2658.

Replication.

Replication of John H. Hall, District Attorney for the United States for the District of Oregon, who prosecutes for the said United States in this behalf to the answer of defendant.

This replicant, for the said United States, saving and reserving all advantage of exception to the said answer, for replication thereunto says, that he, for the said United States, will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by this replicant. Without this, that any other matter or thing whatsoever in

the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed, or denied, is true. All which matter and things this replicant, for the said United States, is and will be ready to aver and prove, as this Honorable Court shall direct; and for the said United States he prays as in and by his said bill he has already prayed.

JOHN H. HALL,
United States Attorney.

Filed August 8th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards to wit, on the 6th day of October, 1902, there was duly filed in said court a stipulation of facts in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Stipulation of Facts.

It is stipulated and agreed as follows:

Item 1. The Act of Congress approved July 25th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the

Central Pacific Railroad in California, to Portland, in Oregon," as printed in volume 14 of the United States Statutes at Large, on pages 239 and following, is admitted in evidence.

Item 2. The Oregon Central Railroad Company is a corporation duly incorporated and organized on April 22d, 1867, by and in virtue of the laws of the State of Oregon.

Item 3. That the legislature of the State of Oregon, by its Joint Resolution adopted October 20th, 1868, duly designated the said Oregon Central Railroad Company as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred, by the Act of Congress referred to in "Item 1'" hereof; and prior to the year 1869 the said company duly became entitled to all the benefits, privileges, and grants in the State of Oregon, mentioned in or offered by the said Act of Congress.

Item 4. The Act of Congress approved June 25th, 1868, entitled "An Act to amend an act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California to Portland, in Oregon,'" as printed in volume 15 of the United States Statutes at Large, on page 80, is admitted in evidence.

Item 5. The Act of Congress approved April 10th, 1869, entitled "An Act to amend an act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland in Oregon,' approved

July twenty-five, eighteen hundred and sixty-six," as printed in volume 16 of the United States Statutes at Large, on page 47, is admitted in evidence.

Item 6. That on or about July 1st, 1869, the said Oregon Central Railroad Company duly filed in the department of the Interior its assent to the act of Congress referred to in "Item 1" hereof.

Item 7. On October 29th, 1869, the said Oregon Central Railroad Company filed in the office of the Secretary of the Interior, and on January 29th, 1870, the Secretary of the Interior duly accepted and approved, a map of the definite location and survey of the first section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from Portland to a point at or near Jefferson, and comprised not less than sixty continuous miles from the northern terminus thereof.

Item 8. On March 26th, 1870, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on March 29th, 1870, duly accepted and approved, maps of the definite location and survey of the second section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point at or near Jefferson, to a point on the south line of township 27 south, range 6 west, Willamette meridian, and comprised not less than one hundred and twenty continuous miles of railroad from Jefferson; on January 7th, 1871, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on March

2d, 1871, duly accepted and approved, a map of the definite location and survey of the third section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the south line of township 27 south, range 6 west, to a point in section 30, in township 30 south, range 5 west; on April 6th, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on April 8th, 1882, duly accepted and approved, an amended map of the definite location and survey of the said third section of railroad, which amended line of railroad extended from Station 1154 in section 28, township 29 south, range 5 west, to Station 1320+50 in section 6, township 30 south, range 5 west; on April 6th, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on April 8th, 1882, duly accepted and approved, a map of the definite location and survey of the fourth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 1320+50 in section 6, township 30, range 5 west, to Station 2376+50 in township 31 south, range 7 west; on August 24th, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on September 7th, 1882, duly accepted and approved, a map of the definite location and survey of the fifth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 2376+50 in township 31

south, range 7 west, to the north line of section 33, township 34 south, range 6 west; on June 6th, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and aproved, a map of the definite location and survey of the sixth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said north line of section 33, township 34 south, range 6 west, to the east line of section 21, township 36 south, range 3 west; on July 3d, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on July 6th, 1883, duly accepted and approved, a map of the definite location and survey of the seventh section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said east line of section 21, township 36 south, range 3 west, to the south line of section 32, township 37 south, range 1 west; on September 4th, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the eighth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the south line of section 32, township 37 south, range 1 west, to the east line of section 25, township 39 south, range 1 west; on August 1st, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day

duly accepted and approved, a map of the definite location and survey of the ninth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the east line of section 25, township 39 south, range 1 east, to the north line of section 30, township 40 south range 2 east; and on August 18th, 1884, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the tenth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the north line of section 30, township 40 south, range 2 east, to the southern line of the State of Oregon, in section 13, towship 41 south, range 1 east.

Item. 9. The Commissioner of the General Land Office, under direction of the Secretary of the Interior, withdrew all odd numbered sections of land within thirty miles on each side of the line of railroad shown on the maps set forth and described in Item 8 hereof, from sale or location, pre-emption or homestead entry, on the following dates; opposite and coterminous with, the said first section of railroad, on January 31st, 1870; opposite and coterminous with, the said second section of railroad, on April 7th, 1870; opposite and coterminous with, the said third section of railroad, on March 31st, 1871; opposite and coterminous with, the said amended section of railroad, on July 5th, 1883; opposite, and coterminous with, the said fourth section of

railroad, on July 5th, 1883; opposite, and coterminous with, the said fifth section of railroad, on July 5th, 1883; opposite and coterminous with, the said sixth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said seventh section of railroad, on September 3d, 1883; opposite, and coterminous with, the said eighth section of railroad, on October 27th, 1883; opposite, and coterminous with, the said ninth section of railroad, on October 27th, 1883; and opposite, and coterminous with, the said fourth section of railroad, on December 19th, 1884. And the said withdrawals by the Commissioners have, each and all, remained in full force and effect from the date thereof continuously and including the present time, except in so far as, if at all, they have been affected by an order by the Secretary of the Interior, made on August 15th, 1887, declaring said withdrawals revoked as to the odd numbered sections within the indemnity limits of the grant made by the said Act of July 25th, 1866.

Item 10. The entire railroad contemplated and provided for by the said Act of July 25th, 1866, along the line shown on the maps set forth and described in Item 8 hereof, was constructed in several sections and fully equipped in all respects as required by the said Act of July 25th, 1866, by the said Oregon Central Railroad Company and this defendant; and Commissioners, duly appointed by the President of the United States for that purpose, duly examined the said railroad as completed and equipped in the several sections aforesaid, and duly reported to the President of the United

States, under oath, that each of said sections of railroad had been completed and equipped in all respects as required by the said Act of Congress, and that the same was and were ready for the service contemplated by the said Act; which reports were duly accepted and approved by the President of the United States. The said reports were so made, accepted and approved, on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made on September 28th, 1870, accepted and approved on February 28th, 1871; third twenty miles and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; sixth twenty miles, report made on January 13th, 1872, accepted and approved on March 11th, 1872; seventh, eighth and ninth sections, including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved July 11th, 1878; from Roseburg to the south boundary line of Oregon, in several sections, reports made and approved as the railroad was completed and examined in sections, during the years 1878 to 1889.

Item 11. The S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 35, in township 4 south, range 3 east, Willamette meridian, are parts

of an odd numbered section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866 and are opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of Interior on January 29th, 1870.

(a) On September 29th, 1867, one Alfred Jones filed his pre-emption declaratory statement No. 1845, in the proper land office of the United States, for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said section 35, alleging settlement thereon on September 18th, 1866; which declaratory statement was on file and of record, uncanceled, in the said land office at the several times when the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made under or in pursuance of the said filing.

(b). On November 13th, 1868, one Robert Welch filed his pre-emption declaratory statement No. 2202, in the proper land office of the United States, for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of the said section 35, alleging settlement thereon on November 4th, 1868, which declaratory statement was on file and of record, uncanceled, in the said land office, at the several times when the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made under or in pursuance of the said filing.

(c). On February 8th, 1869, one Matthew Darr filed his pre-emption declaratory statement No. 2231, in the proper land office of the United States, for the land described in the next preceding paragraph hereof, alleging settlement thereon on November 6th, 1868; which declaratory statement was on file and of record, uncanceled, in the said land office, at the several times when the map referred to in the next preceding paragraph hereof was filed and approved; but the final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(d). On December 6th, 1869, one John W. Jackson filed his homestead claim No. 1383, in the proper land office of the United States, for the SE. ¼ of NE. ¼, E. ½ of SE. ¼ and SW. ¼ of SE. ¼ of the said section 35; which homestead claim was on file and of record, uncanceled, in the said land office, at the time when the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(e). On July 12th, 1871, and June 18th, 1877, the proper officers of the United States issued two several patents, in due form, together purporting to convey all the lands in this "Item 11" described unto the defendant, as parts and portions of the lands granted by the said Act of July 25th, 1866; which patents were duly and properly issued unless the pre-emption filings and homestead filing hereinbefore set forth excepted the

said lands from the lands granted by the said Act of July 25th, 1866.

(f). On January 19th, 1878, the defendant sold and by deed conveyed, the SW. ¼ of NE. ¼ and SE. ¼ of NW. ¼ of the said section 35 unto George Welch for the sum of one hundred and eighty dollars; and on or about December 28th, 1887, the defendant sold and by deed conveyed, the SE. ¼ of NE. ¼, the SW. ¼ of NW. ¼, the SE. ¼ and the NE. ¼ of SW. ¼ of the said section 35, unto S. W. R. Jones, a citizen of the United States, for the sum of six hundred and seventy-five dollars; each of which sales and purchases were made in good faith, for value of the lands sold, without notice to either of the said purchasers, other than such presumptive notice as given by the law, of the existence of the said homestead filing or pre-emption filings, or any thereof.

Item 12. The grant made by the said Act of July 25th, 1866, is in course of adjustment by the Secretary of the Interior and the proper officers of the United States, but has not been finally adjusted; and, including all the lands described in the bill of complaint herein, the defendant has not received the full quantity of land promised in the grant made by the said Act of July 25th, 1866.

Item 13. It is further agreed that this stipulation is, and shall always be deemed, conclusive evidence, for the purposes of this suit, of the truth of all the matters and things in it stipulated and agreed to be true, as fully and effectually as if each and all of such matters and things were, or had been, conclusively proven by the

introduction and the testimony of witnesses; but each party reserves the right to introduce further and additional testimony and evidence.

Dated and signed on October 6th, 1902.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendant.
H. M. HOYT,
Acting United States Attorney-General.

Filed October 6th, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of December, 1902, there was duly filed in said court, a stipulation submitting case, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Stipulation Submitting Case.

It is stipulated and agreed that this case may be submitted on the pleadings, stipulation of facts, papers on

file and orders made in the case, and briefs to be filed within sixty days by the complainant and within sixty days thereafter by the defendant.

Dated and signed on December 20th, 1902.

JOHN H. HALL
United States Attorney for Oregon.
WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendant.

Filed December 3d, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 12th day of December, 1904, the same being the 61st judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

No. 2658.
Dec. 12, 1904.

Decree.

The above-entitled suit having been heretofore duly tried and submitted to the Court upon a stipulated

statement of facts, signed by the respective parties, and by the Court taken under advisement until this time, and now at this time the Court being fully advised as to the law and the facts.

It is considered, adjudged and decreed, that the plaintiff have and recover from the defendant the sum of $500.00, being the full value of the lands described in plaintiff's complaint, and for which the patents thereto were sought to be canceled, at the minimum price of $1.25 per acre; and that plaintiff have and recover of and from defendant its costs and disbursements of this suit, taxed at $———, and that execution issue therefor.

CHARLES B. BELLINGER,

Judge.

Filed December 12th, 1904. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 12th day of December, 1904, there was duly filed in said court, an opinion, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY
Defendant.
Case No. 2658.

Opinion.

JOHN H. HALL, for the Complainant.

WM. D. FENTON and WM. SINGER, Jr., for the Defendant.

BELLINGER, J.—The decision in case No. 2657, is decisive of this case. All the lands in question were sold by the defendant to bona fide purchasers. There must be a decree for the value of the lands sold, and it is so ordered.

Filed December 12th, 1904. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 28th day of February, 1905, the same being the 127th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

No. 2658.
Feb. 28th, 1905.

Amended Decree.

Now, at this day, this cause comes on to be heard upon motion of defendant to correct the decree herein heretofore entered in said cause December 12th, 1904, the complainant appearing by W. W. Banks, Assistant United States Attorney, and the defendant appearing by Wm. D. Fenton, its attorney—

Whereupon, it is ordered, adjudged, and decreed, that the said decree of December 12th, 1904, be amended as follows:

It is considered, adjudged, and decreed, that the plaintiff have and recover of and from the defendant the sum of $450.00, being the full value of the lands described in plaintiff's complaint and for which the patents thereto were sought to be canceled, at the minimum price of $1.25 per acre; and that plaintiff have and recover of and from the defendant its costs and disbursements of this suit, taxed at $40.82, and that execution issue therefor.

CHARLES B. BELLINGER,
Judge.

Filed February 28, 1905. J. A. Sladen, Clerk.

And afterwards, to wit, on the 14th day of March, 1905, there was duly filed in said court, a cost-bill in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES

vs.

OREGON AND CALIFORNIA RAILROAD COMPANY.

No. 2658.
March 14, 1905.

Cost-bill.

Statement of disbursements claimed by the complainant in the above-entitled cause, viz:

Clerk's fees	$16.70
Marshal's fees	4.12
Costs in State Circuit Court	
Attorneys' fee	20.00
Attorney's fee for taking ———Depositions, at $2.50 each	
Depositions	
Examiner's fees	
Referee's fees	
Witness' fees	
Total taxed at	40.82

J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy.

District of Oregon—ss.

I, Wm. W. Banks, Assistant United States Attorney, being duly sworn, on my oath say that I am one of the attorneys for the complainant in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said complainant is entitled to recover the same from the defendant O. & C. R. R. Co., as I verily believe.

WM. W. BANKS.

Subscribed and sworn to before me this March 14, 1905.

J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy Clerk.

Filed March 14, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Petition for Appeal.

The defendant, conceiving itself aggrieved by the decree made and entered herein on December 12, 1904, and amended decree made and entered herein February 25th, 1905, giving judgment for plaintiff, hereby appeals from the said decree to the United States Circuit

Court of Appeals for the Ninth Circuit; and files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this Court staying all further proceedings upon the said decree pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this court.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for Defendant.

State of Oregon,
District of Oregon. } ss.

Due service of the within petition for appeal is hereby accepted in said district and admitted to have been made upon complainant herein this 9th day of June, 1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, one of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney and Attorney for Complainant.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, an assignment of errors on appeal, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Assignment of Errors.

In connection with its petition for allowance of appeal herein, the defendant makes and files this assignment of errors made by the Court in its decree entered herein on December 12, 1904, and amended decree made and entered herein February 25, 1905.

I.

1st. That the cause of action, if any, shown by the bill of complaint and proofs, is in assumpsit, at law; and this Court erred in assuming, or exercising, equity jurisdiction of or over the subject matter.

II.

2d. That the Court erred in holding, adjudging or decreeing, that the word "pre-empted," used in the Act

of Congress of July 25th, 1866, granting lands to the defendant, to designate lands excepted from that grant, meant or included lands for which mere pre-emption declaratory statements had been filed.

3d. That the Court erred in holding, adjudging or decreeing, that lands covered by pre-emption declaratory statements filings at time of definite location of the defendant's railroad, were by such mere filings excepted from the defendant's grant as lands pre-empted."

4th. That the Court erred in presuming that all, or any, persons who filed pre-emption declaratory statements for lands described in the bill of complaint herein, were settlers on or who had improved the lands filed for.

5th. That the Court erred in concluding that pre-emption declaratory statements are not permitted to be filed without proof of settlement on and improvement of the land by the person filing; and herein that the Court erred in not taking judicial notice of the Interior Department rules and regulations permitting such filings to be made without any proof.

III.

6th. That the Court erred in holding, adjudging or decreeing that the words "occupied by homestead settlers," used in the said Act of July 25th, 1866, to designate lands excepted from the grant to the defendant, meant or included lands covered by mere homestead filings, made by persons who did not occupy and were not settlers on the lands filed for.

7th. That the Court erred in holding, adjudging or decreeing that lands covered by homestead filings at time of definite location of the defendant's railroad were by such mere filings excepted from the defendant's grant as lands "occupied by homestead settlers."

8th. That the Court erred in holding, adjudging or decreeing that the words "otherwise disposed of," used in the said Act of July 25th, 1866, to designate lands excepted from the grant to the defendant, meant or included lands covered by mere homestead filings, of persons not shown to have settled on or occupied such lands.

9th. That the Court erred in holding, adjudging or decreeing that lands covered by homestead filings at time of definite location of the defendant's railroad were by such mere filings excepted from the defendant's grant as lands "otherwise disposed of."

IV.

10th. That the Court erred in deciding, adjudging or decreeing that any patent issued to the defendant for lands described in the bill of complaint was issued erroneously, inadvertently, or by mistake.

V.

11th. That the Court erred in deciding, or adjudging that the defendant is indebted to the complainant in any sum whatever, or at all, because of any demand or obligation shown by the bill of complaint, or proved in the case.

12th. That the Court erred in ordering, adjudging or decreeing that complainant have or recover from the defendant the sum of $450.00, or any sum, as the value at $1.25 per acre, or as any value, of the lands described in the bill of complaint; with or without costs of suit.

Wherefore the defendant prays that the said decree be reversed, and that the complainant's bill of complaint herein be dismissed.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for Defendant.

State of Oregon,
District of Oregon. } ss.

Due service of the within assignment of errors is hereby accepted in said district and admitted to have been made upon complainant herein this 9th day of June, 1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, one of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney and Attorney for Complainant.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Friday, the 9th day of June, 1905, the same being the 42d judicial day of the regular April term of said court—Present the Honorable WILLIAM B. GILBERT, United States Circuit Judge presiding—the following proceedings were had in said cause, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2658.

Order Allowing Appeal.

Having considered the defendant's petition for allowance of appeal and supersedeas from the decree made and entered herein on December 12, 1904, and amended decree made and entered herein February 25, 1905, together with the assignment of errors, on motion of Mr. Wm. D. Fenton, of counsel for defendant, the appeal of defendant is allowed as prayed, upon giving a bond in the sum of $750.00, to be approved by this Court; which bond shall operate as a supersedeas from date of its approval.

Made and entered on June ninth, 1905.

WM. B. GILBERT,
Judge.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA, Complainant, vs. OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.	Case No. 2658.

Bond on Appeal.

We, Oregon and California Railroad Company and R. Koehler, each of Portland, Oregon, are held and firmly bound unto the United States of America, complainant above named, in the sum of seven hundred fifty dollars to be paid unto the said complainant; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. The Oregon and Cali-

fornia Railroad Company, defendant above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and supersedeas, from the decree entered in the above-entitled suit on December 12, 1904, and amended decree made and entered herein February 25th, 1905; and the condition of this obligation is, that if the said Oregon and California Railroad Company shall prosecute its appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages interest, and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeal good, thence this obligation to be void; otherwise to remian in full force.

Dated and signed on June 9th, 1905.

OREGON AND CALIFORNIA RAILROAD COMPANY, [Seal]
By R. KOEHLER,
Second Vice-President.
R. KOEHLER. [Seal]

State of Oregon,
County of Multnomah. } ss.

R. Koehler and ———, being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of, and freeholder within, the State and District of Oregon, and am worth the sum of seven hundred and fifty dollars, over and above all my just debts and

liabilities, in property situated in said District, exclusive of property exempt from execution.

[Seal] R. KOEHLER.

Subscribed and sworn to before me on June 9th, 1905.

R. A. LEITER,

Notary Public in and for Multnomah County, Oregon.

The foregoing bond approved on June 9th, 1905.

WM. B. GILBERT,

Judge.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 6th day of July 1905, there was duly filed in said court, a stipulation to extend time to file transcript of record on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
} No. 2658.

Stipulation to Extend Time to File Transcript.

It is hereby stipulated that the time of defendant may be enlarged thirty days in which to file the tran-

script herein on appeal to the United States Circuit Court of Appeal for the Ninth Circuit.

Dated July 6th, 1905.

FRANCIS J. HENEY,

United States District Attorney and Attorney for Complainant.

WM. D. FENTON,

Attorney for Defendant.

Filed June 6th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards to wit, on Thursday, the 6th day of July, 1905, the same being the 63d judicial day of the regular April term of said court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

Case No. 2658.
July 6th, 1905.

Order Extending Time to File Transcript.

Upon stipulation of parties herein by their respective attorneys—

It is ordered that the time of defendant in which to file the transcript on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged thirty days.

JOHN J. DE HAVEN,
Judge.

Clerk's Certificate to Transcript.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 3 to

77, inclusive contain a full true and complete transcript of the record and proceedings had in said Court, in cause No. 2658, The United States of America, Plaintiff and Appellee, vs. The Oregon and California Railroad Company, Defendant and Appellant, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is thirty-eight 10/100 dollars, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 24th day of July, A. D. 1905.

[Seal] J. A. SLADEN,
Clerk.

[Endorsed]: No. 1224. United States Circuit Court of Appeals for the Ninth Circuit. The Oregon and California Railroad Company, Appellant, vs. The United States of America. Transcript of Record. Upon Appeal from the Circuit Court of the United States for the District of Oregon.

Filed August 4, 1905.

F. D. MONCKTON,
Clerk.

No. 1225

see briefs in 1223

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

TRANSCRIPT OF RECORD.

Upon Appeal from the Circuit Court of the United States for the District of Oregon.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

No. 2657.
July 6th, 1905.

Order Enlarging Time to File Transcript.

Upon stipulation of parties herein by their respective attorneys—

It is ordered that the time of defendant in which to file the transcript on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged thirty days.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: No. 1225. United States Circuit Court of Appeals, for the Ninth Circuit. Oregon and California Railroad Company vs. United States. Order under Rule 16. Filed July 17, 1905. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA,
Complainant and Appellee,

vs.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant and Appellant.

Case No. 2657.

Citation.

To the United States of America, Greeting:

The Oregon and California Railroad Company having, on this day, been granted an order of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered on December 12, 1904, decree made and amended and entered herein February 25, 1905, in suit No. 2657, in the Circuit Court of the United States for the District of Oregon, brought by the United States of America as complainant against the said company, and the bond on appeal of the said company having been this day filed and approved.

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on July 9th, 1905, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, on June 9th, 1905.

WM. B. GILBERT,
Judge.

State of Oregon,
County of Multnomah. } ss.

Due service of the within citation is hereby received at Portland, Oregon, this 9th day of June, 1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney, of Attorneys for Complainant.

[Endorsed]: Original. No. 2657. United States Circuit Court of Appeals, Ninth Circuit. United States of America vs. Oregon and California Railroad Company. Citation. United States Circuit Court. Filed June 9, 1905. J. A. Sladen, Clerk.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1900.

Be it remembered, that on the 19th day of February, 1901, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, Sitting in Equity.

The United States of America by John W. Griggs, its Attorney General brings this its bill of complaint against the Oregon and California Railroad Company, a corporation organized under and by virtue of the laws of the State of Oregon, and a citizen of said State and District, and complaining says:

I.

That the Congress of the United States by an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," approved July 25th, 1866, authorized such company, organized under the laws of Oregon, as the legislature

of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, and running thence through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon Company every alternate section of public lands of the United States, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, ten on each side of said railroad; and when any of said alternate sections, or parts of sections, should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof under the direction of the Secretary of the Interior in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections; and as soon as the said company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminous, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad so far as located, and within the limits above specified. And your orator further shows that by joint resolution, adopted October 20th, 1868, of the legislature of the State of Oregon, the Oregon Central Rail-

road Company was designated in accordance with the said last mentioned Act of Congress as capable of receiving and undertaking the privileges, franchises, grants and duties above set forth, and did become the corporation entitled to all the benefits and subject to all the obligations of said Act of Congress, and that on or about April 4th, 1870, the said Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, became the successor and assign of said Oregon Central Railroad Company.

II.

And your orator would further show unto your Honors, that on the 26th day of March, 1870, the officers of the Oregon and California Railroad Company definitely fixed the line of the first 60 miles of said road authorized by said Act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office and presented same to the then Secretary of the Interior showing among other things a route along the line authorized by said Act of Congress, approved July 25th, 1866, and the following described, among other lands in the State of Oregon, were odd-numbered sections or parts of sections of land, not mineral, within the place limits of said proposed line of railroad as designated by said map, viz.:

NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 11, T. 39 S., R. 2 E. of the Willamette meridian; Lot 1, Sec. 15, T. 3 S., R. 1 E.; W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, Sec. 9, T. 5 S., R. 1 E.; W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, Sec, 13, T. 6 S., R. 1 E.; S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, Sec. 3, T. 2 S., R, 2 E.;

S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼, Sec. 21, T. 4 S., R. 2 E.; Lot 1, Sec. 7, T. 5 S., R. 2 E.; S. W. ¼, Sec. 27, T. 1 S., R. 3 E.; S. E. ¼ of S. E. ¼, Sec. 35, T. 2 S., R. 3 E.; N. W. ¼, Sec. 19, T. 2 S., R. 2 W.; and W. ½, S. W. ¼, Sec. 35, T. 9 S., R. 3 W.; N. ½ of S. W. ¼, Sec. 9, T. 18 S., R. 5 W.; N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼, and W. ½ of Sec. 5, T. 23 S., R. 5 W.; S. W. ¼ and N. E. ¼, and W. ½ of S. E. ¼ of Sec. 3, T. 10 S., R. 6 W.; Lot 8, Sec. 15, T. 23 S., R. 7 W., amounting in all to 1496.96 of acres, all of said lands being situated within the State of Oregon.

III.

And your orator would further show unto your Honors, that on the 16th day of May, 1857, R. Ogle, a duly qualified pre-emptioner under the laws of the United States duly filed his declaratory statement, No. 131, at the Land Office at Oregon City, Oregon, upon Lot 1 in Sec. 15, T. 3 S. of R. 1 E. of the Willamette meridian, with bona fide intention of acquiring title thereto from the United States under the pre-emption laws of the United States; that said lands were at said date public lands of the United States and subject to pre-emption entry; that upon the 25th day of July, 1866 at the time of the passage of the Act aforesaid, and upon the 29th day of June, 1870, at the time of definite location of said railroad, said declaratory statement and filing was in full force and uncanceled; that by the provisions of said land grant said tract of land did not pass to the grantees, but the legal title thereof remained in the United States.

And your orator would further show unto your Honors, that upon the 9th day of May, 1871, the President of the United States through inadvertance, and without knowledge of the adverse claim of the said R. Ogle, issued to the defendant, the Oregon and California Railroad Company, a patent for said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing such patent to defendant, and so your orator avers that the patent to said lands is void and should be so declared, but that said defendant company still claims title to said land under said patent, and withholds said lands from your orator.

IV.

And your orator would further show unto your Honors that upon the 9th day of July, 1879, E. Wells, was a person qualified under the law to acquire lands from the United States by cash entry or otherwise, and that upon the said 9th day of July, 1879, the said E. Wells, duly filed at the local land office within the State of Oregon, cash entry No. 5498, upon the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 11, T. 39 S., R. 2 E. of the Willamette meridian which lands were then public lands of the United States, and subject to sale by cash entry; that upon the 2d day of August, 1883, defendant, the Oregon and California Railroad Company filed its map of definite location with the Commissioner of the General Land Office at Washington, opposite to and coterminous with said tract of land; that by the terms of

the grant to the predecessor of the said Railroad Company of July 25th, 1866. the title to said lands did not pass to the grantee, as such cash entry and was in full force and uncanceled.

And your orator would further show unto your Honors, that upon the 16th day of March, 1896, the President of the United States, without knowledge of the adverse claim of the said E. Wells, issued to the defendant, the Oregon and California Railroad Company, a patent for said tract of land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing a patent to the defendant for the lands herein described under the facts as stated herein, and so your orator avers that said patent to said land is void and should be so declared; that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

V.

And your orator would further show unto your Honors, that upon the 12th day of September, 1867, John E. Perdue, was a person qualified to make homestead entry on public lands under the laws of the United States; that on said 12th day of September, 1867, said John E. Perdue duly filed his homestead entry No. 907, in the proper land office within the State of Oregon, upon the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 9 in T. of R. 1 E. of the Willamette Meridian, that said lands were then public lands of the United States and subject to home-

stead entry; that upon the 29th day of January, 1870, the defendant, the Oregon and California Railroad Company, filed its line of definite location with the Secretary of the Interior under the grant to its predecessor of July 25th, 1866, opposite to and coterminous with the above tract of land, and that at the time of the filing of the said definite line of location the said homestead entry of John E. Perdue was uncanceled and was in full force and effect, and that by reason thereof the title to the said tract of land did not pass to the defendant the Oregon and California Railroad Company under the terms of its said grant.

And your orator would further show unto your Honors that upon the 18th day of June, 1877, the President of the United States without knowledge of the adverse claim of John E. Perdue issued to the defendant the Oregon and California Railroad Company a patent for said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing a patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

VI.

And your orator would further show unto your Honors, that upon the 11th day of September, 1858, I. V.

Willis, was a person qualified under the laws of the United States to acquire title to lands in the United State under the pre-emption laws thereof, and that on the said 11th day of September, 1858, said I. V. Willis, duly filed his declaratory statement No. 431 in the proper land office within the State of Oregon with a bona fide intent to acquire title thereto under the pre-emption laws of the United States to the W. ½ of the S. E. ¼ of Sec. 13, T. 6 S., R. 1 E. of the Willamette Meridian, which said land was then and there public lands of the United States and subject to pre-emption entry under the laws thereof; that upon the 29th day of January, 1870, the defendant the Oregon and California Railroad Company filed its line of definite location with the Secretary of the Interior of the United States opposite to and coterminous with said tract of land, but at the time of the filing of the said map the pre-emption filing and entry of the said I. V. Willis was uncanceled and still in full force and effect, and by the terms of the grant of July 25th, 1866, to the predecessor of defendant the title to said land did not pass under said grant but remained in the United States.

And your orator would further show unto your Honors, that upon the 18th day of June, 1877, the President of the United States without knowledge of the adverse claim of I. V. Willis issued to the defendant the Oregon and California Railroad Company a patent to said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and

contrary to law in issuing the patent to the defendant the Oregon and California Railroad Company for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

VII.

And your orator would further show unto your Honors, that upon the 1st day of June, 1859, N. N. Matlock was a duly qualified entryman as a pre-emptioner under the laws of the United States; that on the said 1st day of June, 1859, said N. N. Matlock duly filed at the land office at Oregon City, Oregon, his declaratory statement No. 657, with a bona fide intent then and there to acquire title under the pre-emption laws of the United States to the S. W. ¼ of the N. W. ¼ of Sec. 3, T. 2 S., R. 2 E. of the Willamette Meridian, which said tract of land was then and there public lands of the United States and subject to pre-emption entry thereunder; that defendant the Oregon and California Railroad Company filed with the Secretary of the Interior of the United States its map of definite location of line of said road opposite to and coterminous with said tract of land on the 29th day of January, 1870, but that by the terms of the grant to defendant's predecessor the title to said land did not pass thereunder, but remained in the United States.

And your orator would further show unto your Honors, that on the 18th day of June, 1877, the President

of the United States without knowledge of the adverse claim of N. N. Matlock issued to the defendant the Oregon and California Railroad Company a patent for said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing a patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said land is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

VIII.

And your orator would further show unto your Honors, that upon the 5th day of January, 1870, G. J. Trullinger was a duly qualified entryman under the homestead laws of the United States; that on the 5th day of January, 1870, the said G. J. Trullinger duly filed at the land office at Oregon City, Oregon, his homestead entry No. 1427, upon the S. E. ¼ of the N. E. ¼ and the N. E. ¼ of the S. E. ¼ of Sec. 21, T. 4 S., R. 2 E. of the Willamette Meridian, with a bona fide intent to acquire title thereto under the homestead laws of the United States; that said lands were then and there public lands of the United States and subject to entry under the homestead laws of the United States; that the defendant the Oregon and California Railroad Company filed its map of definite location opposite to and coterminous with said lands with the Secretary of the Interior on

the 29th day of January, 1870, but that the title to said lands did not pass to defendant by reason of the terms of the grant to defendant's predecessor of July 25th, 1866, that said title remained in the United States by reason of the facts that at the time of said definite location said homestead entry of G. J. Trullinger was uncanceled and still in full force and effect.

And your orator would further show unto your Honors, that on the 18th day of June, 1877, the President of the United States without knowledge of the adverse claim of G. J. Trullinger, issued to defendant, the Oregon and California Railroad Company a patent for said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing a patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

IX.

And your orator would further show unto your Honors, that on the 28th day of September, 1865, J. J. Dingman was a duly qualified entryman under the homestead laws of the United States; that on the said 28th day of September, 1865, said J. J. Dingman duly filed in the land office at Oregon City, Oregon, his homestead entry No. 323, with the bona fide intent to acquire title from the United States to Lot 1, in Sec. 27, T. 5 S., R.

2 E. of the Willamette Meridian, which said lands were then and there public lands of the United States and subject to homestead entry; that on the 29th day of January, 1870, defendant the Oregon and California Railroad Company filed its map of definite location opposite to and coterminus with said tract of land with the Secretary of the Interior, but that the title to said land did not pass to defendant by the terms of the grant to defendant's predecessor of July 25th, 1866, for the reason that at the time of the filing of said map of definite location said homestead entry of J. J. Dingman was uncanceled and still in full force and effect.

And your orator would further show unto your Honors, that on the 12th day of July, 1871, the President of the United States without knowledge of the adverse claim of J. J. Dingman issued to the defendant the Oregon and California Railroad Company, a patent for said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing a patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

X.

And your orator would further show unto your Honors, that on the 22d day of December, 1866, George W. Dyke was a qualified entryman under the home-

stead laws of the United States; that on the 22d day of December, 1866, George W. Dyke duly filed in the land office at Oregon City, Oregon, his homestead entry No. 764, upon the S. W. ¼ of Sec. 27, T. 1 S., R. 3 E., with a bona fide intention of acquiring title to the same under the homestead laws of the United States; that said land was then and there public lands of the United States and subject to homestead entry; that the defendant herein the Oregon and California Railroad Company on the 29th day of January, 1870, filed its map of definite location of said road opposite to and coterminous with the said lands with the Secretary of the Interior, but that the said defendant did not acquire title to the said lands under the grant to its predecessor of July 25th, 1866, but the title thereof under the terms of said grant remained in the United States, that on the said 29th day of January, 1870, said homestead entry was uncanceled and in full force and effect.

And your orator would further show unto your Honors, that on the 18th day of June, 1877, the President of the United States without knowledge of the adverse claim of George W. Dyke issued to defendant the Oregon and California Railroad Company, a patent for said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing a patent to the defendant for the lands described herein under the facts herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant

company still claims title to said lands under said patent and withholds said lands from your orator.

XI.

And your orator would further show unto your Honors, that on the 24th day of May, 1859, S. Fieldhammer was a duly qualified entryman under the pre-emption laws of the United States; that on the 24th day of May, 1859, the said S. Fieldhammer duly filed in the land office at Oregon City, Oregon, his declaratory statement No. 562 upon the S. E. ¼ of the S. E. ¼ of Sec. 35, T. 2 S., R. 3 E. of the Willamette Meridian with the bona fide intent to then and there acquire title to the same under the pre-emption laws of the United States; that said land was then and there public lands of the United States and subject to pre-emption entry under the laws thereof; that on the 29th day of January, 1870, defendant the Oregon and California Railroad Company filed with the Secretary of the Interior its map of definite location, opposite to and coterminus with said land, but that the title to said land did not pass under the grant of July 25th, 1866, made to defendant's predecessor, but the title thereof remained in the United States; that at the time of filing of the map of definite location and at the date of the passage of the Act of July 25th, 1866, said pre-emption entry of said S. Fieldhammer was uncanceled and still in full force and effect.

And your orator would further show unto your Honors, that on the 29th day of May, 1871, the Presi-

dent of the United States without knowledge of the claim of S. Fieldhammer issued a patent to defendant the Oregon and California Railroad Company, to said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing patent to defendant the Oregon and California Railroad Company for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds same from your orator.

XII.

And your orator would further show unto your Honors, that on the 19th day of January, 1870, Lorenzo P. Heaton was a qualified entryman under the homestead laws of the United States; that on the said 19th day of January, 1870, the said Lorenzo P. Heaton duly filed in the land office at Oregon City, Oregon, his homestead entry No. 1450 upon the N. W. $\frac{1}{4}$ of Sec. 19, T. 2 S. of R., 2 W. of the Willamette Meridian, with the bona fide intent to acquire title thereto under the homestead laws of the United States; that said lands were then and there public lands of the United States subject to homestead entry under the laws thereof; that the defendant, the Oregon and California Railroad Company, on the 29th day of June, 1870, filed its map of definite location opposite to and coterminous with said lands with the

Secretary of the Interior, but that the patent to said lands did not pass to defendant under the terms of the grant to defendant's predecessor of July 25th, 1866, but remained in the United States for the reason that at the date of the filing of the map of definite location said homestead entry was uncanceled and in full force and effect.

And your orator would further show unto your Honors that on the 18th day of June, 1877, the President of the United States, without knowledge of the claim of Lorenzo P. Heaton, issued to defendant, the Oregon and California Railroad Company, a patent for said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing patent to the defendant the Oregon and California Railroad Company for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholders same from your orator.

XIII.

And your orator would further show unto your Honors that on the 23d day of May, 1867, G. W. Hail was a qualified entryman under the pre-emption laws of the United States; that on the 23d day of May, 1867, the said G. W. Hail duly filed in the proper land office within the State of Oregon his declaratory statement No. 1967, upon the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Sec. 35, T. 9 S., R. 3 W.

of the Willamette Meridian, with a bona fide intent to acquire title to said land under the pre-emption laws of the United States; that said lands was then and there vacant public lands of the United States and subject to pre-emption entry under the laws thereof; that on the 29th day of January, 1870, defendant the Oregon and California Railroad Company filed its map of definite location opposite to and coterminous with said lands with the Secretary of the Interior, but that title to said lands did not pass to defendant by the terms of the grant of July 25th, 1866, but the title thereof remained in the United States for the reason that at the time of the filing of the map of definite location said pre-emption entry was uncanceled and in full force and effect.

And your orator would further show unto your Honors, that on the 12th day of July, 1871, the President of the United States without knowledge of the claim of G. W. Hail issued a patent to defendant, the Oregon and California Railroad Company to said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing a patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

XIV.

And your orator would further show unto your Honors, that on the 14th day of February, 1855, J. W. Dough-

erty was a duly qualified donation claimant under the laws of the United States and that on said date he duly filed in the proper land office within the State of Oregon, notification No. 5877 for the N. ½ of the S. W. ¼ of Sec. 9, T. 18 S., R. 5 W. of the Willamette Meridian with a bona fide intent to acquire title thereto under the donation land laws of the United States, which said lands were then and there public lands of the United States and subject to settlement under the donation land laws; that on the 26th day of March, 1870, the defendant, the Oregon and California Railroad Company filed with the Secretary of the Interior its map of definite location opposite to and coterminous with said lands, but that the title to said lands did not pass to defendant under the terms of the grant to defendant's predecessor of July 25th, 1866, for the reason that at the time of the filing of said map of definite location the said donation entry was uncanceled and in full force and effect.

And your orator would further show unto your Honors, that on the 29th day of May, 1873, the President of the United States without knowledge of the claim of J. W. Dougherty issued to defendant, the Oregon and California Railroad Company a patent to said land.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing a patent to defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defend-

ant company still claims title to said lands under said patent and withholds said lands from your orator.

XV.

And your orator would further show unto your Honors, that on the 27th day of October, 1853, James C. Clark was a duly qualified entryman and claimant under the donation land laws of the United States as applicable to the State of Oregon; that on said date James C. Clark duly filed in the proper land office within the State of Oregon, donation certificate No. 3704 upon the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of Sec. 5, T. 23 S. of R. 5 W. of the Willamette Meridian with a bona fide intent to acquire title thereto under the donation land laws of the United States; that said land was then and there vacant public lands and subject to entry under the donation land laws of the United States; that on the 26th day of March, 1870, the defendant the Oregon and California Railroad Company filed with the Secretary of the Interior its map of definite location of its said road opposite to and coterminous with said lands, but that the title to said lands did not pass to defendant under the grant to its predecessor of July 25th, 1866, for the reason that at the time said grant took effect, and at the time of the filing of the map of definite location said donation entry was uncanceled and was in full force and effect.

And your orators would further show unto your Honors that on the 3d day of December, 1894, the President of the United States, without knowledge of the claim of James C. Clark, issued a patent to defendant the

Oregon and California Railroad Company, to said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing a patent to defendant for the lands described herein under the facts as stated herein, and so your orator avers said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

XVI.

And your orator would further show unto your Honors that on the 9th day of May, 1868, T. O. Bevens was a duly qualified entryman under the homestead laws of the United States, and on said date he duly filed in the proper land office within the State of Oregon his homestead entry No. 1047 upon the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 3, T. 10 S. of R. 6 W. of the Willamette Meridian with a bona fide intent to acquire title thereto under the homestead laws of the United States; that said land was then and there vacant public lands and subject to homestead entry; that on the 26th day of March, 1870, defendant, the Oregon and California Railroad Company, filed with the Secretary of the Interior its map of definite location of its said road opposite to and coterminous with said lands, but that title to said lands did not pass to defendant under the terms of the grant to its predecessor of July 25th, 1866, for the reason that at the time of the filing of the map of definite location as aforesaid the said homestead entry was uncanceled and in full force and effect.

And your orator would further show unto your Honors that on the 18th day of June, 1877, the President of the United States, without knowledge of the claim of T. O. Bevens, issued a patent to defendant the Oregon and California Railroad Company to said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously, and contrary to law in issuing patent to the defendant for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

XVII.

And your orator would further show unto your Honors that on the 15th day of September, 1868, William A. Miers was a duly qualified entryman under the pre-emption laws of the United States; that on said date he duly filed at the proper land office within the State of Oregon his declaratory statement No. 1238 upon Lot 8 in Sec. 15, T. 23 S. of R. 7 W. of the Willamette Meridian with a bona fide intent to acquire title thereto under the pre-emption laws of the United States; that said land was then and there public lands of the United States and subject to entry under the pre-emption laws thereof; that on the 26th day of March, 1870, defendant the Oregon and California Railroad Company filed in the office of the Secretary of the Interior its map of definite location of its said road, but that the title to said lands did

not pass to defendant by the terms of the grant to its predecessor of July 25th, 1866, for the reason that at the time of filing said map of definite location said preemption entry was uncanceled and still in full force and effect.

And your orators would further show unto your Honors that on the 3d day of December, 1894, the President of the United States, without knowledge of the claim of William A. Miers, issued a patent to defendant the Oregon and California Railroad Company to said lands.

But your orator avers that the ministerial officers of the United States acted mistakenly, erroneously and contrary to law in issuing a patent to the defendant for the lands described herein, under the facts stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

XVIII.

And your orator would further show unto your Honors that the Congress of the United States, by an act entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3d, 1887, directed and authorized the Secretary of the Interior to adjust all grants theretofore unadjusted, and if it should appear that any lands had been erroneously patented to any railroad company, to make demand for relinquishment or reconveyance, that if such company should re-

fuse to reconvey within ninety days, then it should be the duty of the Attorney General to commence and prosecute in the proper court the necessary proceedings to cancel such patents and restore title to the United States. And your orator avers that on the 29th day of June, 1900, the total grant of lands in the State of Oregon under said grant of July 25th, 1866, to said Oregon Central Railroad Company to the rights of which the said Oregon and California Railroad Company had succeeded as aforesaid, was unadjusted, and the Secretary of the Interior, regarding the said patents to the above described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute, and in accordance with such direction the Commissioner of the General Land Office did, on the 24th day of June, 1900, make demand on said railroad company, by letter addressed to William H. Mills, land agent of the Oregon and California Railroad Company, controlling the grant for said Oregon and California Railroad Company for reconveyance of said above-described lands. And your orator avers that said demand has been refused, and that said defendant has refused and still refuses to so reconvey said lands.

XIX.

And your orator would further show unto your Honors on information and belief, that the defendant, the Oregon and California Railroad Company, claims to have sold to bona fide purchasers some of the lands hereinbefore described; that the value of the lands

hereinbefore set forth and described is the sum of $2.50 per acre.

XX.

And your orator would further show unto your Honors that if it shall be made to appear by answer of defendant, or intervention of parties interested or otherwise to your Honorable Court that any of said lands have been sold or conveyed to bona fide purchasers, and that the title of said bona fide purchaser or purchasers to said lands shall be confirmed, that the plaintiff shall recover of and from defendant, the Oregon and California Railroad Company, the sum of $2.50 per acre for all of said lands so sold and conveyed to said bona fide purchasers.

XXI.

And your orator would further show unto your Honors that on account of the complexity of the matters to be inquired into, and as your orator is entirely remediless according to the strictest rules of the common law, and for the purpose of avoiding a multiplicity of suits, your orator brings this suit into this court, where matters of this kind are properly cognizable and relievable.

Forasmuch, therefore, as your orator can have no adequate relief except in this court, and to the end therefore that the said defendant may (complainant hereby waiving the necessity of an answer by said defendant company, but not under oath), to the best and utmost of its respective knowledge, remembrance and belief, full, true, direct and perfect answer make to each of the several interrogatories hereinafter numbered and

set forth, as by the note hereunder written it is required to answer, that is to say:

1. Whether any of the lands described herein have been sold to bona fide purchasers?

2. What lands, if any, herein set forth have been sold, if sales were had?

3. To whom were the lands sold, and what were the true terms of the sale, whether for cash or on deferred payments?

And your orator prays also that the money received by the defendant for any of the lands described herein upon sales thereof be declared to be moneys and property of the United States, and a decree that they are held in trust by defendant for the complainant, and that such money to the extent of $2.50 per acre for the lands erroneously taken be paid to complainant, and that the lands not sold by defendant be declared to be lands of the United States, and the patents thereto be decreed to be null and void, and that your orator shall have such other and further relief as the case may require, and as shall seem meet to the Court, and as shall be agreeable to equity and good conscience.

And may it please your Honors to grant unto your orator a writ of subpoena directed to the said Oregon and California Railroad Company, commanding it to appear and answer unto this Bill of Complaint, but not under oath (an answer under oath being hereby expressly waived), and to abide and perform such order and decree in the premises as to the Court shall seem

meet and be required by the principles of equity and good conscience.

JOHN W. GRIGGS,
Attorney General of the United States.

JOHN H. HALL,
United States Attorney for the District of Oregon.

Filed February 19, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 19th day of February, 1901, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 23d day of February, 1901, at Portland, Multnomah County, in said District, I duly served the within subpoena ad respondendum upon the therein named The Oregon and California R. R. Co., by delivering to one R. Koehler, Second Vice-president of said company, personally a true copy of said subpoena ad respondendum, duly certified to by J. A. Sladen, Clerk United States Circuit Court, together with a copy of the bill of complaint in the within entitled suit duly

certified to by John H. Hall, United States attorney for said District.

ZOETH HOUSER,
United States Marshal.
By J. A. Wilson,
Deputy.

Marshal's fees, $4.12.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Subpoena ad Respondendum.

The President of the United States of America, to The Oregon and California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in the city of Portland, in said District, on the first Monday of April next, which will be the first day of April, A. D. 1901, to answer the exigency of a bill of complaint exhibited and filed

against you in our said Court, wherein The United States of America is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of February, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States, the one hundred and twenty-fifth.

J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

Returned and filed February 23, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 28th day of March, 1901, there was duly filed in said court, a praecipe for appearance of defendant, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Praecipe for Appearance of Defendant.

The clerk of the Circuit Court of the United States for the District of Oregon will please enter appearance of the defendant, Oregon and California Railroad Company, in the above-entitled action, by

WM. D. FENTON and
WM SINGER, Jr.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

Filed and entered March 28, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 23d day of March, 1901, there was duly filed in said court, a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until June 3d, 1901, to file its plea, demurrer or answer to the complainant's bill, in the above-entitled case; and the clerk of the said Court will please procure and enter a proper order accordingly.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON,
Of Attorneys for Defendant.

Filed March 28, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 29th day of May, 1901, there was duly filed in said court, a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until July 1st, 1901, to file its plea, demurrer or answer to the complainant's bill in the above-entitled case; and the clerk of the said Court will please procure and enter a proper order accordingly.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON,
Of Attorneys for Defendant.

Filed May 29, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Friday, the 31st day of May, 1901, the same being the 46th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES,

vs.

THE OREGON AND CALIFORNIA RAILROAD CO.

No. 2657.
May 31, 1901.

Order Extending Time to Plead.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States Attorney, and the defendant by Mr. R. A. Leiter, of counsel, and, thereupon, on motion of said defendant, and upon stipulation of the parties hereto, filed herein, it is ordered, that said defendant be, and it is hereby allowed until Monday, July 1st, 1901, in which to file its answer, or otherwise plead herein.

And afterwards, to wit, on the 25th day of June, 1901, there was duly filed in said court a stipulation extending time to plead, in words and figures as follows, to wit:

Circuit Court of the United States, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Stipulation Extending Time to Plead.

It is stipulated that the defendant may have until August 5th, 1901, to file its plea, demurrer or answer to the complainant's bill, in the above-entitled case; and the clerk of the said Court will please procure and enter a proper order, accordingly.

JOHN H. HALL,
United States Attorney for Oregon.

Filed June 25, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 5th day of August, 1901, there was duly filed in said court, an answer, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA, Compainant, vs. OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.	No. 2657.

Answer.

The answer of the defendant, Oregon and California Railroad Company, to the complainant's bill of complaint herein.

The defendant, Oregon and California Railroad Company, now and at all times saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties or imperfections in the said bill of complaint, for answer thereto, or to so much thereof as the defendant is advised it is material or necessary for it to make answer to, answering:

Sub. I.

Par. 1. The defendant admits, and alleges, that the Congress of the United States, by an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved on July 25th, 1866, authorized and empowered such company organized under the laws of Oregon as the legislature of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly, through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, where the same should connect with another railroad which the said Act authorized to be constructed in the State of California. That the said Act also granted unto such Oregon company its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and provided that when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the

limits of said first-named alternate sections. And the said Act further provided, that as soon as the said company should file in the office of the Secretary of the Interior a map of the survey of said railroad or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale the public lands by the said Act granted, on each side of the railroad so far as located; and that whenever the said company had twenty or more consecutive miles of any portion of the said railroad ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same, and if it should appear that twenty consecutive miles of railroad had been completed and equipped in all respects as required, the said commissioners should so report under oath to the President of the United States, and thereupon patents should issue to the said company for the lands granted, to the extent of and coterminous with the completed section of said railroad.

Par. 2. The defendant admits, and alleges, that the Oregon Central Railroad Company is, and ever since April 22d, 1867, has been, a corporation duly organized and existing under the laws of the State of Oregon. That the legislature of the State of Oregon, by Joint Resolution entitled "Senate Joint Resolution No. 16, Relating to the Railroad Land Grant from the Central Pacific Railroad in California, to Portland, Oregon," adopted March 20th, 1868, duly designated the said Oregon Central Railroad Company as the railroad company

entitled to receive the lands granted in Oregon, and the benefits and privileges conferred, by the said Act of July 25th, 1866.

Par. 3. The defendant admits, and alleges, that it is, and ever since March 17th, 1870, has been, a corporation duly organized and existing under the laws of the State of Oregon; and admits and avers that on April 4th, 1870, it became, ever since has been, and now is, the successor and assign of the Oregon Central Railroad Company, and entitled to all the privileges, benefits and grants in Oregon, provided by the said Act of July 25th, 1866.

Par. 4. The defendant alleges that during the year 1869, and within the time allowed by the Act of Congress, approved April 10th, 1869, entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six," the said Oregon Central Railroad Company duly filed in the department of the interior its assent to the said Act of Congress of July 25th, 1866.

Par. 5. The defendant alleges, that on October 29th, 1869, the said Oregon Central Railroad Company filed in the office of the Secretary of the Interior, and on January 29th, 1870, the Secretary of the Interior accepted and approved, a map of the definite location and survey of the first section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which

section of railroad extended from Portland to a point at or near Jefferson, and comprised not less than sixty continuous miles from the northern terminus thereof.

Par. 6. The defendant alleges, that on March 26th, 1870, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the second section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point at or near Jefferson, to a point near the southeast corner of section 35, in township 27 south, range 6 west, Willamette Meridian, and comprised not less than one hundred and twenty continuous miles of railroad from Jefferson; that on January 7th, 1871, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the third section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point near the southeast corner of section 35, in township 27 south, range 6 west, to section 30, in township 30 south, range 5 west; that on April 6th, 1882, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, an amended map of the definite location and survey of the said third section of railroad, which amended line of railroad extended from a point in section 28, township

29 south range 5 west, to Station 1320+50 in section 6, township 30 south, range 5 west; that on April 6th, 1882, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the fourth section of the railroad in Oregon provided for by the said Act of July 25th, 1866 which section of railroad extended from the said Station 1320+50 in section 6, township 30 south, range 5 west, to Station 2376+50 in township 31 south, range 7 west; that on July 27th, 1882, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the fifth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 2376+50 in township 31 south, range 7 west, to a point in section 33, township 34 south, range 6 west; that on June 6th, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the sixth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point in section 33, township 34 south, range 6 west, to a point in section 21, township 36 south, range 3 west; that on July 3d, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior duly ac-

cepted and approved, a map of the definite location and survey of the seventh section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point in section 21, township 36 south, range 3 west, to the south line of section 32, township 37 south, range 1 west, that on September 6th, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the eighth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the south line of section 32, township 37 south, range 1 west, to the east line of section 25, township 39 south, range 1 east; that on August 2d, 1883, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the ninth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the east line of section 25, township 39 south, range 1 east, to the north line of section 30, township 40 south, range 3 east; and that on August 20th, 1884, it (this defendant) filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the tenth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of

railroad extended from the said point on the north line of section 30, township 40 south, range 2 east, to the southern line of the State of Oregon, in section 13, township 41 south, range 1 east.

Par. 7. The defendant alleges, that the Commissioner of the General Land Office, under direction of the Secretary of the Interior, withdrew all odd-numbered sections of land within thirty miles on each side of the line of railroad shown on the maps set forth and described in "Par. 6," hereof, from sale or location, pre-emption or homestead entry, on the following dates: Opposite, and coterminous with, the said first section of railroad, on January 31st, 1870; opposite, and coterminous with, the said second section of railroad, on April 7th, 1870; opposite, and coterminous with, the said third section of railroad, on March 31st, 1871; opposite, and coterminous with, the said amended section of railroad, on July 5th, 1883; opposite, and coterminous with, the said fourth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said fifth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said sixth section of railroad, on July 5th, 1883; opposite, and coterminous with, the said seventh section of railroad, on September 3d, 1883; opposite, and coterminous with, the said eighth section of railroad on October, 27th, 1883; opposite and coterminous with, the said ninth section of railroad, on October 27th, 1883; and opposite, and coterminous with, the said tenth section of railroad on December 19th, 1884. And the defendant alleges that the said with-

drawals by the Commissioner have, each and all, remained in full force and effect from the date thereof continuously to and including the present time, except in so far as, if at all, they have been affected by an order of the Secretary of the Interior, made on August 15th, 1887, declaring said withdrawals revoked as to the odd-numbered sections within the indemnity limits of the grant made by the said Act of July 25th, 1866.

Par. 8. The defendant alleges, that the entire railroad contemplated and provided for by the said Act of July 25th, 1866, along the line shown on the maps set forth and described in "Par. 6" hereof, was constructed in several sections and fully equipped in all respects as required by the said Act of July 25th, 1866, by the said Oregon Central Railroad Company and this defendant; and Commissioners, duly appointed by the President of the United States for that purpose, duly examined the said railroad as completed and equipped in the several sections aforesaid, and duly reported to the President of the United States, under oath, that each of said sections of railroad had been completed and equipped in all respects as required by the said Act of Congress, and that the same was and were ready for the service contemplated by the said Act; which reports were duly accepted and approved by the President of the United States. The said reports were so made, accepted and approved, on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made on July 5th,

1870, accepted and approved on February 28th, 1871; third twenty miles and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; sixth twenty miles report made on January 13th, 1872, accepted and approved on March 11th, 1872; seventh, eighth, and ninth sections including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved on July 11th, 1878; from Roseburg to the south boundary line of Oregon, in several sections, reports made and approved as the railroad was completed and examined in sections, during the years 1878 to 1889.

Sub. II.

Par. 9. The defendant admits that the first sixty miles of its railroad was definitely fixed and a plat therof duly filed, but denies that the date thereof was or is March 26th, 1870, as alleged in the bill of complaint herein, and alleges that the true particulars in this [illegible]are as set forth in Sub. 1, Par. 5, of this answer; and the defendant admits that all the lands described in subdivision II of the bill of complaint herein, are odd-numbered sections, or parts of odd-numbered sections, of land, not mineral, within the primary limits of the land grant made by the said Act of July 25th, 1866; and the defendant admits that all of said lands lying north of the south line of township 10 south, are within the primary limits of that portion of the said grant designated by the plat of the first sec-

tion of said railroad (filed on October 29th, 1869, not on March 26th, 1870, as alleged in the bill of complaint herein); alleges that the remainder of said lands are opposite and coterminous with other sections of said railroad, but denies that any of such other lands are opposite, or coterminous with the said first section of railroad.

Sub. III.

Par. 10. The defendant alleges that the true facts and particulars in respect of the matters and things set forth in subdivision III of the bill of complaint herein, are as follows: Lot 1, of section 15, township 3 south, range 1 east is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. At all the times when the said grant was made and the railroad definitely located and constructed, pre-emption declaratory statement No. 131, in the name of one R. Ogle, for the said lot, purporting to have been filed on May 16th, 1857, was on file in the United States land office at Oregon City, Oregon; but the said lot was never pre-empted in pursuance of the said filing, or otherwise. Thereafter on May 9th, 1871, and while the said lot remained vacant and unappropriated public land, not included by any exception to the grant of lands made by the said Act of July 25th, 1866, except in so far as, if at all, the existence of the

said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said lot to it (this defendant). The defendant denies that the said lot did not pass to it (defendant) by the said grant of July 25th, 1866, because of the sad declaratory statement, or any cause; and denies that the said patent was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. And in this behalf defendant alleges that the said lot constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said lot under the said grant and patent.

Par. 11. The defendant has no knowledge nor information as to the matters and things set forth in subdivision III of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 12. Further answering, the defendant alleges that it (this defendant), on March 28th, 1874, sold and by deed bearing that date conveyed the said lot unto the European and Oregon Land Company, a corporation of Oregon; that the said sale and purchase were made in good faith, for full value of the said lot in hand paid at the time of sale, without notice to or

knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever in or to the said lot, or any part thereof, and the said corporation was and is a bona fide purchaser of the said lot.

Sub. IV.

Par. 13. The defendant alleges that the true facts and particulars in respect of the matters and things set forth in subdivision IV of the bill of complaint herein, are as follows: The NE. ¼ of NE. ¼ of section 11, township 39 south, range 2 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of the defendant's railroad which was definitely located on August 2d, 1883. On September 1st 1883 (but not on July 9th, 1879, as alleged in subdivision IV of the bill of complaint herein), one E. Wells was permitted by the local United States land officers to and did, make cash entry No. 5498 of and for the said tract; which cash entry the Commissioner of the General Land Office held for cancellation on July 15th, 1884, and finally canceled on November 25th, 1887; the said Commissioner having duly ascertained, and finally determined, that the said cash entry was erroneously permitted to be made at a date subsequent to the date of the definite location of this defendant's railroad opposite and coterminous with the last described tract of land. Thereafter, on March 16th, 1896, the proper officers of the United States is-

sued a patent conveying the said tract to it (this defendant). The defendant denies that the said tract of land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said cash entry, or any cause; and denies that the said patent was issued mistakenly, erroneously, or contrary to law, or that the said patent is void. And in this behalf the defendant alleges that the said tract constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued and the defendant admits that it (defendant) claims title to the said tract under the said land grant and patent.

Par. 14. The defendant has no knowledge nor information as to the matters and things set forth in subdivision IV of the bill of complaint herein not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in any wise true.

Sub. V.

Par. 15. The defendant admits that the W. ½ of SE. ¼ of section 9, township 5 south, range 1 east, was covered by homestead No. 907, in the name of John E. Perdue, filed in the proper land office of the United States on September 12th, 1867; but alleges, on information and belief, that the said Perdue did not occupy the said land as a homestead settler, or otherwise, at the date its (defendant's) railroad was definitely

located opposite and coterminous with the said land. The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead, or any cause; and denies that the patent, set forth in subdivision V of the bill of complaint herein, was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest hereinafter mentioned claim title to the said land under the said grant and patent.

Par. 16. The defendant has no knowledge nor information as to the matters and things set forth in subdivision V of the bill of complaint herein not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 17. Further answering, the defendant alleges that it (this defendant), on August 11, 1900, made and entered into contract No. 5817 with S. O. Owen, for the credit sale of said land by this defendant to the said S. O. Owen; that the said sale and purchase were made in good faith for a consideration price, paid and agreed to be paid, equal to the full value of the said land, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed

to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said S. O. Owen was and is a bona fide purchaser of the said land.

Sub. VI.

Par. 18. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision VI of the bill of complaint herein, are as follows: The W. ½ of SE. ¼ of section 13, township 6 south, range 1 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of the defendant's railroad which was definitely located on October 29, 1869, the construction of which was finally accepted and approved on January 29th, 1870. At all the times when the said grant was made and railroad definitely located and constructed, pre-emption declaratory statement No. 431, in the name of I. V. Willis, for the said land, purporting to have been filed on September 11th, 1858, was on file in the United States land office at Oregon City, Oregon; but the said land was never pre-empted, in pursuance of the said filing, or otherwise. Thereafter, on July 18th, 1877, and while the said land remained vacant and unappropriated public land, not included by any exception to the grant of lands made by the said Act of July 25th, 1866, except in so far as, if at all, the existence of the said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said land to it

(this defendant). The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said declaratory statement, or any cause; and denies that the said patent was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) claims title to said land under the said grant and patent.

Par. 19. The defendant has no knowledge nor information as to the matters and things set forth in subdivision VI of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Sub. VII.

Par. 20. The defendant alleges that the true facts and particulars in respect of the matters and things set forth in subdivision VII of the bill of complaint herein, are as follows: The SW. ¼ of NW. ¼ of section 3, township 2 south, range 2 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on October 29th, 1869, the con-

struction of which was finally accepted and approved on January 29th, 1870. At all the times when the said grant was made and railroad definitely located and constructed pre-emption declaratory statement No. 657, in the name of N. N. Matlock, for the said land, purporting to have been filed on June 1st, 1859, was on file in the United States land office at Oregon City, Oregon; but the said land was never pre-empted, in pursuance of the said filing, or otherwise. Thereafter, on June 18th, 1877, and while the said land remained vacant and unappropriated public land, not included by any exception to the grant of lands made by the said Act of July 25th, 1866, except in so far as, if at all, the existence of the said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said land to it (this defendant). The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said declaratory statement or any cause; and denies that the said patent was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 21. The defendant has no knowledge nor information as to the matters and things set forth in sub-

division VII of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint are in anywise true.

Par. 22. Further answering, the defendant alleges that it (this defendant), on February 26th, 1880, sold and by deed bearing that date conveyed the said land unto John Aldred; that the said sale and purchase were made in good faith for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said John Aldred was and is a bona fide purchaser of the said land.

Sub. VIII.

Par. 23. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision VIII of the bill of complaint, are as follows: The SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 21, township 4 south, range 2 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on October 29th, 1869 (not on January 29th, 1870, as alleged in subdivision VIII of the bill of complaint herein), the construction of which was finally accepted and approved on January 29th, 1870. On January 5th, 1870, and after

definite location of the defendant's railroad as aforesaid, homestead No. 1427 was filed in the United States land office at Oregon City, Oregon, in the name of G. J. Trullinger, for the said land; but the defendant alleges, on information and belief, that the said Trullinger did not occupy the said land as a homestead settler, or otherwise, at any time. Thereafter, on June 18th, 1877, the proper officers of the United States issued a patent conveying the said land to it (this defendant). The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead filing, or any cause; and denies that the said patent was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And in this behalf defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 24. The defendant has no knowledge nor information as to the matters and things set forth in subdivision VIII of the bill of complaint herein not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 25. Further answering, the defendant alleges that it (this defendant), on February 28th, 1891, sold

and by deed bearing that date conveyed the said SE. ¼ of NE. ¼ unto D. L. Trullinger; that the said sale and purchase were made in good faith for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said D. L. Trullinger was and is a bona fide purchaser of the said land.

Par. 26. Further answering, the defendant alleges that it (this defendant), on August 12th, 1885, sold and by deed bearing that date conveyed, the said NE. ¼ of SE. ¼ unto E. L. Trullinger; that the said sale and purchase were made in good faith for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said E. L. Trullinger was and is a bona fide purchaser of the said land.

Sub. IX.

Par. 27. The defendant admits that Lot 1, in section 7, township 5 south, range 2 east, was covered by a homestead No. 323, in the name of J. J. Dingman, filed in the land office of the United States at Oregon City, Oregon, on September 28th, 1865; but alleges, on information and belief, that the said Dingman did not occupy the said land as a homestead settler, or other-

wise, on July 25th, 1866, or at the date its (defendant's) railroad was definitely located opposite and coterminous with the said land. The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead, or any cause, and denies that the patent, set forth in subdivision IX of the bill of complaint was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said lands, under the said grant and patent.

Par. 28. The defendant has no knowledge nor information as to the matters and things set forth in subdivision IX of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 29. Further answering, the defendant alleges that it (this defendant), on August 12th, 1885, sold and by deed bearing that date, conveyed, said land unto Oscar W. Sturgess; that the said sale and purchase were made in good faith, for full value of the said land in hand paid at the time of the sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have,

any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said Sturgess was and is a bona fide purchaser of the said land.

Sub. X.

Par. 30. The defendant admits that the SW. $\frac{1}{4}$ of section 27, township 1 south, range 3 east, was covered by homestead No. 764, in the name of George W. Duke, filed in the United States land office at Oregon City, Oregon, on December 22d, 1866; but alleges, on information and belief that the said Duke did not occupy the, said land as a homestead settler, or otherwise, at the date its (defendant's) railroad was definitely located opposite and coterminous with the said land. The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead, or any cause; and denies that the patent set forth in subdivision X of the bill of complaint herein, was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant), and its grantees and successors in interest, hereinafter mentioned, claim the title to the said land under the said grant and patent.

Par. 31. The defendant has no knowledge nor information as to the matters and things set forth in subdivision X of the bill of complaint herein, not expressly

admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 32. Further answering, the defendant alleges that it (this defendant), on August 12th, 1885, sold and by deed bearing that date conveyed the said land unto Milliam Mellien; that the said sale and purchase were made in good faith, for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right title or interest whatsoever in or to the said land, or any part thereof—and the said Mellien was and is a bona fide purchaser of the said land.

Sub. XI.

Par. 33. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision XI of the bill of complaint herein, are as follows: The SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 35, township 2 south, range 3 east, is part and parcel of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. At all times when the said grant was made and railroad definitely located and constructed pre-emption declaratory statement No. 562,

in the name of one S. Fieldhammer, for the said land, purporting to have been filed on May 24th, 1859, was on file in the United States land office at Oregon City, Oregon; but the said lot was never pre-empted in pursuance to the said filing, or otherwise. Thereafter, on May 9th, 1871, and while the said lot remained vacant and unappropriated public land not included by any exception to the grant of lands made by the said Act of July, 1866, except in so far as, if at all, the existence of the said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said land to it (this defendant). And the defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said declaratory statement, or any cause; and denies that the said patent was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land, under the said grant and patent.

Par. 34. The defendant has no knowledge nor information as to the matters and things set forth in subdivision XI of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that

any of such matters and things, as set forth in the bill of complaint are in any wise true.

Par. 35. The defendant alleges that it (this defendant), on August 17th, 1876, sold and by deed bearing that date conveyed, the said land unto Ludwig Dane; that the said sale and purchase were made in good faith, for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever in or to the said land, or any part thereof—and that the said Dane was and is a bona fide purchaser of the said land.

Sub. XII.

Par. 36. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision XII of the bill of complaint herein, are as follows: The NW. ¼ of section 19, township 2 south, range 2 west, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. On January 19th, 1870, subsequent to definite location of the coterminous section of defendant's railroad as aforesaid, homestead No. 1450 was filed in the United States land office at Oregon City, Oregon, in the name of one Lorenz P. Heaton; but defendant alleges, on information and belief, that the

said Heaton did not occupy the said land as a homestead settler, or otherwise, at any time. The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead, or any cause; and denies that the patent, set forth in subdivision XII of the bill of complaint herein was issued mistakenly, erroneously, or contrary to law or that said patent is void. And the defendant alleges that the said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 37. The defendant has no knowledge nor information as to the matters and things set forth in subdivision XII of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in any wise true.

Par. 38. Further answering, the defendant alleges that it (this defendant), on August 15th, 1885, sold and by deed bearing that date conveyed, the E. ½ of NW. ¼ of the said section 19 unto the Oswego Iron Works, a corporation of Oregon; that the said sale and purchase were made in good faith, for full value of the said land, in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser

that the United States had, or claimed to have, any right, title or interest whatsoever in or to the said land, or any part thereof—and the said corporation was and is a bona fide purchaser of the said land.

Par. 39. Further answering, the defendant alleges that it (this defendant), on June 16th, 1883, under credit contract payable in ten annual installments, sold unto Theodore H. Lammers the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of the said section 19; that all the payments provided for in the said contract were duly made, and on February 6th, 1899, this defendant issued its deed conveying the said land unto E. L. McCormick, assignee of the said Theodore H. Lammers. That the said sales and purchases were made in good faith for full value of the said land at the time of the sales, without notice to or knowledge of this defendant or either of the said purchasers that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and each of the said purchasers was and is a bona fide purchaser.

Sub. XIII.

Par. 40. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision XIII of the bill of complaint herein, are as follows: The W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 35, township 9 south, range 3 west, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad

which was definitely located on October 29th, 1869, the construction of which was finally accepted and approved on January 29th, 1870. At all the times when the said railroad was definitely located and constructed, pre-emption declaratory statement No. 1967, in the name of one G. W. Hail, for the said land, purporting to have been filed on May 23d, 1867, was on file in the United States Land office at Oregon city, Oregon; but the said land was never pre-empted in pursuance of the said filing, or otherwise. Thereafter, on July 12th, 1871, and while the said land remained vacant and unappropriated public lands, not included by any exception to the grant of lands made by the said Act of July 25th, 1866, except in so far as, if at all, the existence of the said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said land to it (this defendant). The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said declaratory statement, or any cause; and denies that the said patent was issued mistakenly, erroneously or contrary to the law, or that the said patent is void. And in this behalf defendant alleges that said land constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 41. The defendant has no knowledge nor infor-

mation as to the matters and things set forth in subdivision XIII of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 42. Further answering, the defendant alleges that it (this defendant), on June 18th, 1894, sold and by deed bearing that date conveyed, the said land unto James W. Fiddler; that the said sale and purchase were made in good faith, for the full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said Fiddler was and is a bona fide purchaser of the said land.

Sub. XIV.

Par. 43. The defendant admits that the N. ½ of SW. ¼ of section 9, township 18 south, range 5 west, was covered by donation notification No. 5877, in the name of J. W. Dougherty, filed in the proper land office of the United States prior to July 25th, 1866; but alleges, on information and belief, that the said J. W. Dougherty abandoned the said land without having paid for it or resided thereon four years, nor was he residing thereon on July 25th, 1866, nor at the date this defendant's railroad was definitely located opposite and coterminous with the said land. The defendant denies that the said land did not pass to it (defendant) by the said grant of

July 25th, 1866, because of the said notification, or any cause; and denies that the patent set forth in subdivision XIV of the bill of complaint herein, was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. But the defendant alleges that the said land constituted a part and parcel of the lands granted by the said act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 44. The defendant has no knowledge or information as to the matters and things set forth in subdivision XIV of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer; and on that ground denies that, any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Par. 45. Further answering, the defendant alleges that it (this defendant), on September 4th, 1889, sold by credit contract payable in ten annual installments, the said land unto Gust Petzold, all of which payments were duly made, and on November 27th, 1899, this defendant conveyed the said land by deed unto the said contract purchaser; that the said sale and purchase were made in good faith, for full value of said land at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land or any part thereof—and

the said purchaser was and is a bona fide purchaser of the said land.

Sub. XV.

Par. 46. The defendant admits that the NE. ¼ of NE. ¼, W. ½ of NE. ¼, and W. ½ of section 5, township 23 south; range 5 west, was covered by donation notification No. 3704, in the name of James C. Clark, filed in the proper land office of the United States prior to July 25th, 1866; but alleges, on information and belief, that the said James C. Clark abandoned the said land without having paid for it or resided thereon for four years, nor was he residing thereon on July 25th, 1866, nor at the date this defendant's railroad was definitely located opposite and coterminous with the said land. The defendant denies that the said land did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said notification or any cause; and denies that the patent set forth in subdivision XV of the bill of complaint herein was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. But the defendant alleges that the said land constituted a part and parcel of the lands granted by the said act of July 25th 1866, and the said patent was properly and lawfully isued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 47. The defendant has no knowledge nor information as to the matters and things set forth in subdivision XV of the bill of complaint herein, not expressly

admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in any wise true.

Par. 48. Further answering, the defendant alleges that it (this defendant), on May 23d, 1887, sold the credit contract payable in ten annual installments the SW. ¼ of NE. ¼ of the said land unto F. M. Andrews, all of which installments were duly paid, and on October 3d, 1898; this defendant conveyed the said land by deed unto the said contract purchaser; that the said sale and purchase were made in good faith, for full value of the said land at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title, or interest whatsoever in or to the said land or any part thereof—and the said purchaser was and is a bona fide purchaser of the said land.

Sub. XVI.

Par. 49. The defendant admits that the SW. ¼ of NE. ¼ and W. ½ of SE. ¼ of section 3 township 10, south, range 6 west, was covered by homestead No 1047 in the name of T. O. Bevens, filed in the United States land office at Oregon City, Oregon, on May 9; 1868; but alleges, on information and belief; that the said Bevens did not occupy the said land as a homestead settler, or otherwise, at the date its (defendant's) railroad was definitely located opposite and coterminous with the said land. That defendant denies that the said land did not

pass to it (defendant) by the said grant of July 25th, 1866, because of the said homestead, or any cause; and denies that the patent set forth in subdivision XVI of the bill of complaint herein was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. And in this behalf the defendant alleges that the said land constituted a part and parcel of the lands granted by the said act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 50. The defendant has no knowledge nor information as to the matters and things set forth in subdivision XVI of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in any wise true.

Par. 51. Further answering, the defendant alleges that it (this defendant), on February 28th, 1891, sold and by deed bearing that date conveyed the SW ¼ of NE. ¼ and NW. ¼ of SE. ¼ of the said land unto Thomas O. Bevens; that the said sale and purchase were made in good faith, for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any

part thereof, and the said purchaser was and is a bona fide purchaser of the said land.

Par. 52. Further answering, the defendant alleges that it (this defendant), on February 18th, 1891, sold and by deed bearing that date conveyed the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of the said land unto Thomas O. Bevens; that the said sale and purchase were made in good faith, for full value of the said land in hand paid at the time of sale, without notice to or knowledge of either this defendant or the said purchaser that the United States had, or claimed to have, any right, title or interest whatsoever, in or to the said land, or any part thereof—and the said purchaser was and is a bona fide purchaser of the said land.

Sub. XVII.

Par. 53. The defendant alleges that the true facts and particulars respecting the matters and things set forth in subdivision XVII of the bill of complaint herein, are as follows: Lot 8, of section 15, township 23 south, range 7 west, is part of an odd section of land within the primary limits of the grant made by the said act July 25th, 1866, and is opposite and coterminous with the section of defendant's railroad which was definitely located on March 26th, 1870. On March 26th, 1870, pre-emption declaratory statement No. 1238, in the name of William A. Miers, for the said lot, purporting to have been filed on September 15th, 1868, was on file in the United States land office at Oregon City, Oregon; but the said lot was never pre-empted, in pursuance of the said filing, or otherwise. Thereafter, on December 3d, 1894,

and while the said lot remained vacant and unappropriated public land, not included by any exception to the grant of lands made by the said Act of July 25th, 1866, except in so far as, if at all, the existence of the said declaratory statement filing affected its status, the proper officers of the United States issued a patent conveying the said lot to it (this defendant). The defendant denies that said lot did not pass to it (defendant) by the said grant of July 25th, 1866, because of the said declaratory statement, or any cause; and denies that the said patent was issued mistakenly, erroneously, or contrary to the law, or that the said patent is void. And in this behalf defendant alleges that the said lot constituted a part and parcel of the lands granted by the said Act of July 25th, 1866, and the said patent was properly and lawfully issued; and the defendant admits that it (defendant) and its grantees and successors in interest, hereinafter mentioned, claim title to the said land under the said grant and patent.

Par. 53. The defendant has no knowledge nor information as to the matters and things set forth in subdivision XVII of the bill of complaint herein, not expressly admitted, denied or alleged in the next preceding paragraph of this answer, and on that ground denies that any of such matters and things, as set forth in the bill of complaint, are in anywise true.

Sub. XVIII.

Par. 54. The defendant alleges that, including all the lands described in the bill of complaint herein, it

(defendant) has not received the full quantity of land provided in the grant made by the said Act of July 25th, 1866.

Sub. XIX.

Par. 55. The defendant denies that on June 24th, 1900, or at any other time, the Commissioner of the General Land Office (except as hereinafter admitted) made demand on this defendant, by letter addressed to William H. Mills, or otherwise, for reconveyance of the lands described in the bill of complaint, or any part or portion thereof; but the defendant admits that by letter dated September 12th, 1900, addressed to the said William H. Mills, the Commissioner did command reconveyance of the following, but no other, lands described in the bill of complaint herein, to wit: NE. ¼ of NE. ¼ of section 11, township 39 south, range 2 east; W. ½ of SE. ¼ of section 9, township 5 south, range 1 east; W. ½ of SE. ¼ of section 13, township 6 south, range 1 east; N. ½ of NE. ¼ and W. ½ of section 5, township 23 south, range 5 west; lot 8 of section 15, township 23 south, range 7 west.

Sub. XX.

Par. 56. The defendant admits that it claims to have sold to bona fide purchasers some of the lands described in the bill of complaint herein, but denies that the value of the lands described in the bill of complaint is $2.50 per acre, or any sum in excess of $1.25 per acre.

Sub. XXI.

Par. 57. The defendant denies that the complainant is entitled to recover from it (defendant) the sum of

$2.50 per acre, or any other sum, for any lands described in the bill of complaint and sold by it (defendant) to bona fide purchasers; and the defendant alleges, upon information and belief, that this court has no jurisdiction of any demand for judgment in money, sought to be made by the bill of complaint herein.

Sub. XXII.

Par. 58. The defendant denies that there is any complexity in or of matters to be inquired into herein; and denies that on account of the complexity of the matters to be inquired into, or on any account, complainant is remediless according to rules of the common law; and denies that for such reasons, on such account, and for, or for, the purpose of avoiding a multiplicity of suits, the complainant brought this suit in this court. And in this behalf the defendant alleges, on information and belief, that this court has no jurisdiction of any matters and things set forth in the bill of complaint, except in so far as such matters and things relate to the cancellation of patents for lands which have not been sold by this defendant to bona fide purchasers; and as to all other matters and things set forth in the bill of complaint, in so far as, if at all, they state or make out any cause or causes of action, the complainant has a complete, speedy and adequate remedy by a single action at law.

Sub. XXIII.

Par. 59. And the defendant denies all and all manner of matter, cause, or thing in the complainant's said

bill contained, material, or necessary for it to make answer to, and not herein well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of the defendant. All of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court may direct; and the defendant prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

District of Oregon,
Multnomah County. } ss.

Geo. H. Andrews makes solemn oath and says: I am Secretary of the Oregon and California Railroad Company, the defendant named in the foregoing answer. I have read the foregoing answer and know the contents thereof, and the same is true of my knowledge, except as to the matters and things therein stated on information and belief, and as to such matters I verily believe the answer to be true.

GEO. H. ANDREWS.

Subscribed and sworn to before me on August 5th, 1901.

[Seal]

R. A. LEITER,
Notary Public for Oregon.

State of Oregon,
County of Multnomah.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 5th day of August, 1901, by receiving a copy thereof duly certified to as such by Wm. D. Fenton of attorneys for defendant.

JOHN H. HALL,
Attorney for Complainant.

Filed August 5th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 8th day of August, 1901, there was duly filed in said court, a replication, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

UNITED STATES,
Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Replication.

Replication of John H. Hall, District Attorney for the United States for the District of Oregon, who prose-

cutes for the said United States in this behalf to the answer of defendant.

This replicant, for the said United States, saving and reserving all advantages of exception to the said answer, for replication thereunto says, that he for the said United States will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be relied unto by this replicant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things this replicant for the said United States, is and will be ready to aver and prove, and this Honorable Court shall direct; and for the said United States he prays as in and by his said bill he has already prayed.

JOHN H. HALL,
United States Attorney.

Filed August 8th, 1901. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 13th day of June, 1902, there was duly filed in said court, a stipulation of facts, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
} Case No. 2657.

Stipulation of Facts.

It is stipulated and agreed as follows:

Item 1. The Act of Congress approved July 25th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," as printed in volume 14 of the United States Statutes at Large, on pages 239 and following, is admitted in evidence.

Item 2. The Oregon Central Railroad Company is a corporation duly incorporated and organized on April 22d, 1867, by and in virtue of the laws of the State of Oregon.

Item 3. That the legislature of the State of Oregon, by its Joint Resolution adopted October 20th, 1868, duly designated the said Oregon Central Railroad Com-

amended line of railroad extended from Station 1154 in section 28, township 29 south, range 5 west, to Station 1320+50 in section 6, township 30 south, range 5 west; on April 6, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on April 8th, 1882, duly accepted and approved, a map of the definite location and survey of the fourth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 1320+50 in section 6, township 30 south, range 5 west, to Station 2376+50 in township 31 south, range 7 west; on August 24th, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on September 7th, 1882, duly accepted and approved, a map of the definite location and survey of the fifth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said Station 2376+50 in township 31 south, range 7 west, to the north line of section 33, township 34 south, range 6 west; on June 6th, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the sixth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said north line of section 33, township 34 south, range 6 west, to the east line of section 21, township 36 south, range 3 west; on July 3d, 1883, the defendant filed in the office of the

Secretary of the Interior, and the Secretary of the Interior on July 6th, 1883 duly accepted and approved, a map of the definite location and survey of the seventh section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said east line of section 21, township 36 south, range 3 west, to the south line of section 32 township 37 south, range 1 west; on September 4th, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the eighth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the south line of section 32, township 37 south, range 1 west, to the east line of section 25, township 39 south, range 1 west; on August 1st, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the ninth section of the railroad in Oregon provided for by the said Act of July 25th, 1866, which section of railroad extended from the said point on the east line of section 25, township 39 south, range 1 east, to the north line of section 30, township 40 south, range 2 east; and on August 18th, 1884, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the tenth section of the railroad in Oregon provided for by

proved on February 28th, 1871; third twenty miles and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; sixth twenty miles, report made on January 13th, 1872, accepted and approved on March 11th, 1872; seventh, eighth and ninth sections including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved July 11th, 1878; from Roseburg to the south boundary line of Oregon, in several sections, reports made and approved as the railroad was completed and examined in sections, during the years 1878 to 1889.

Item 11. Lot 1 of section 15, township 3 south, range 1 east, is part of an odd section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On May 16th, 1857, one R. Ogle filed his pre-emption declaratory statement No. 131, in the proper land office of the United States, for the said lot; which declaratory statement was on file and of record, uncanceled, in the said land office, at the times the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was

never tendered nor made under or in pursuance of the said filing.

(b) On May 9th, 1871, the proper officers of the United States issued a patent, in due form, purporting to convey the said lot to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of R. Ogle, hereinbefore set forth, excepted the said lot from the lands granted by the said Act of July 25th, 1866.

(c) On March 28th, 1874, the defendant sold, and by deed bearing that date conveyed, the said lot unto the European and Oregon Land Company, a corporation of Oregon; which sale and purchase were made in good faith, for full value of the said lot at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said pre-emption declaratory statement.

Item 12. The W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 9, township 5 south, range 1 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On September 12th, 1867, one John E. Perdue filed his homestead claim No. 907, in the proper land office of the United States, for the tract of land de-

scribed in the next preceding paragraph hereof; which homestead claim was on file and of record, uncanceled, in the said land office, at the times the map of definite location referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered or made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said land as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the homestead filing of John E. Perdue, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On August 11th, 1900, the defendant made and entered into contract No. 5817 with one S. O. Owen, for the credit sale of said land to him; upon which contract $56 was paid on account of the purchase price at the time, and the balance of purchase price, with interest, was agreed to be paid ten years from the date of contract, and the said contract is still in full force and effect. The said contract purchase was made in good faith, for a consideration price paid and agreed to be paid equal to the full value of the land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead filing.

Item 13. The W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 13, township 6 south, range 1 east is a part of an odd section of un-

offered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On September 11th, 1858, one I. V. Willis filed his pre-emption declaratory statement No. 431 in the proper land office of the United States, for the land described in the next preceding paragraph hereof; which declaratory statement was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said land to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of I. V. Willis, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

Item 14. The SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of section 3, township 2 south, range 2 east, is part of an odd section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and

coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On June 1st, 1859, one N. N. Matlock filed his pre-emption declaratory statement No. 657, in the proper land office of the United States, for the land described in the next preceding paragraph hereof; which declaratory statement was on file and of record, uncanceled, in the said land office, at the times the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tenderd nor made under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said lot to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of N. N. Matlock, hereinbefore set forth, excepted the said lands granted by the said Act of July 25th, 1866.

(c) On February 26th, 1880, the defendant sold, and by deed bearing that date conveyed, the said land unto John Aldred; which sale and purchase were made in good faith for full value of the said land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said pre-emption declaratory statement.

Item 15. The SE. ¼ of NE. ¼ and NE. ¼ of SE. ¼ of section 21, township 4 south, range 2 east, are parts of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and are opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On January 5th, 1870, one G. J. Trullinger filed his homestead claim No. 1427, in the proper land office of the United States, for the lands described in the next preceding paragraph hereof; which homestead claim was on file and of record uncanceled, at the times the map referred to it in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said lands to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the homestead claim of G. J. Trullinger, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On February 28th, 1891, the defendant sold, and by deed bearing that date conveyed, the said SE. ¼ of NE. ¼ unto D. L. Trullinger; which sale and purchase were made in good faith, for full value of the said land

at the time of sale without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead claim.

(d) On August 12th 1885, the defendant sold, and by deed bearing that date conveyed, the said NE. ¼ of SE. ¼ unto E. L. Trullinger; which sale and purchase were made in good faith, for full value of the said land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead claim.

Item 16. Lot 1 of section 7, township 5 south, range 2 east, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On September 28th, 1865, one J. J. Dingman filed his homestead claim No. 323 in the proper land office of the United States, for the said lot; which homestead claim was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On July 12th, 1871, the proper officers of the United States issued a patent, in due form, purporting to convey the said lot to the defendant as part and portion of the lands granted by the said Act of July 25th,

1866; which patent was duly and properly issued unless the homestead filing of J. J. Dingman, hereinbefore set forth, excepted the said lot from the lands granted by the said Act of July 25th, 1866.

(c) On August 12th, 1885, the defendant sold, and by deed bearing that date conveyed, the said lot unto Oscar W. Sturgess; which sale and purchase were made in good faith, for full value of the said lot at the time of sale without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead filing.

Item 17. The SW. ¼ of section 27, township 1 south, range 3 east, is part of an odd section of land, within the primary limits of the grant made by the said Act of July 25th, 1866, and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On December 22d, 1866, one George W. Dukes filed his homestead claim No. 764, in the proper land office of the United States, for the said land; which homestead claim was on file and of record, uncanceled, in the said land office at the times the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered or made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent in due form, purporting to convey the said land to the defendant as part and

portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the homestead claim of the said George W. Dukes, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On August 12th, 1885, the defendant sold, and by deed bearing that date conveyed, the said land unto William Mellien; which sale and purchase were made in good faith, for full value of the said land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead filing.

Item 18. The SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 35, township 2 south, range 3 east, is part of an odd section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On May 29th, 1859, one S. Fieldhammer filed his pre-emption declaratory statement No. 562, in the proper land office of the United States, for the said land, which declaratory statement was on file and of record, uncanceled, in the said land office at the times the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or pay-

ment was never tendered nor made, under or in pursuance of the said filing.

(b) On May 9th, 1871, the proper officers of the United States issued a patent, in due form, purporting to convey the said lands to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of S. Fieldhammer, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On August 17th, 1876, the defendant sold, and by deed bearing that date conveyed, the said land unto Ludwig Dane; which sale and purchase were made in good faith for full value of the said land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said pre-emption declaratory statement.

Item 19. The NW. $\frac{1}{4}$ of section 19, township 2 south, range 2 west, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On January 19th, 1870, one Lorenzo P. Heaton filed his homestead claim No. 1450, in the proper land office of the United States, for the said land; which

homestead claim was on file and of record, uncanceled, in the said land office, at the times the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said land to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the homestead filing of Lorenzo P. Heaton, hereinbefore set forth excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On August 15th, 1885, the defendant sold, and by deed bearing that date conveyed, the E. ½ of NW. ¼ of the said section 19 unto the Oswego Iron Works, a corporation; which sale and purchase were made in good faith, for full value, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead filing.

(d) On June 16th, 1883, the defendant sold under credit contract payable in ten annual installments unto Theodore H. Lammers, the W. ½ of NW. ¼ of the said section 19; that all the payments provided for in the said contract were duly made, and on February 6th, 1899, the defendant issued its deed conveying the said W. ½ of NW. ¼ unto E. L. McCormick, assignee of the said Theodore H. Lammers; that the said sales and purchases were made in good faith, for full value, without

notice other than such presumptive notice as is given by the law of the existence of the said homestead filing.

Item 20. The W. ½ of SW. ¼ of section 35, township 9 south, range 3 west, is part of an odd section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with the Secretary of the Interior on October 29th, 1869, and approved by the Secretary of the Interior on January 29th, 1870.

(a) On May 23d, 1867, one G. W. Hail filed his pre-emption declaratory statement No. 1976, in the proper land office of the United States for the said land; which declaratory statement was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On July 12th, 1871, the proper officers of the United States issued a patent, in due form, purporting to convey the said land to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of G. W. Hail, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On June 18th, 1894, the defendant sold, and by deed bearing that date conveyed, the said land unto James W. Fidler; which sale and purchase were made in good faith, for full value, without notice other than such presumptive notice as is given by the law of the existence of the said pre-emption declaratory statement.

Item 21. The N. ½ of SW. ¼ of section 9, township 18 south, range 5 west, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with and approved by the Secretary of the Interior on March 29th, 1870.

(a) On February 14th, 1855, one J. W. Dougherty filed his donation notification No. 5877, in the proper land office of the United States, for the said land; which notification was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said notification.

(b) On May 29th, 1872, the proper officers of the United States issued a patent, in due form, purporting to convey the said land to the defendant as part and portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the donation notification of J. W. Dougherty,

hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On September 4th, 1889, the defendant sold, by credit contract payable in ten annual installments, the said land unto Gust Petzold, all of which payments were duly made, and on November 27th, 1899, the defendant conveyed the said land by deed unto the said contract purchaser; which sale and purchase were made in good faith, for full value, without notice other than such presumptive notice as is given by law of the existence of the said donation notification.

Item 22. The SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 3, township 10 south, range 6 west, is part of an odd section of land within the primary limits of the grant made by the said Act of July 25th, 1866; and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with and approved by the Secretary of the Interior on March 29th, 1870.

(a) On May 9th, 1868, one T. O. Bevens filed his homestead claim No. 1047, in the proper land office of the United States, for the said land; which homestead claim was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered nor made, under or in pursuance of the said filing.

(b) On June 18th, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said land to the defendant as part and

portion of the lands granted by the said Act of July 25th, 1866; which patent was duly and properly issued unless the homestead filing, hereinbefore set forth, excepted the said land from the lands granted by the said Act of July 25th, 1866.

(c) On February 28th, 1891, the defendant sold, and by deed bearing that date conveyed, the SW. ¼ of NE. ¼ and NW. ¼ of SE. ¼ of the said section 3, unto Thomas O. Bevens; which sale and purchase were made in good faith, for full value of the said land at the time of sale, without notice to the said purchaser other than such presumptive notice as is given by the law of the existence of the said homestead filing.

(d) On February 18th, 1891, the defendant sold, and by deed bearing that date conveyed, unto J. H. Watson and Thomas O. Bevens, the SW. ¼ of SE. ¼ of the said section 3; which sale and purchase were made in good faith, for full value of the said land at the time of sale, without notice to the said purchasers other than such presumptive notice as is given by the law of the existence of the said filing.

Item. 23. Lot 8 of section 15, township 23 south, range 7 west, is part of an odd section of unoffered land within the primary limits of the grant made by the said Act of July 25th, 1866, and is opposite and coterminous with that section of the defendant's railroad the map of definite location and survey of which was filed with and approved by the Secretary of the Interior on March 29th, 1870.

(a) On October 30th, 1887, one John Morin filed his

pre-emption declaratory statement No. 1167, in the proper land office of the United States, for the said lot; which declaratory statement was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph was filed and approved; but final proof or payment was never tendered or made, under or in pursuance of the said filing.

(b) On September 15th, 1868, one William A. Mills, filed his pre-emption declaratory statement No. 1238, in the proper land office of the United States, for the said lot; which declaratory statement was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph hereof was filed and approved; but final proof or payment was never tendered or made, under or in pursuance of the said filing.

(c) On December 3d, 1894, the proper officers of the United States issued a patent, in due form, purporting to convey the said lot to the defendant as part and portion of the lands granted by the said Act of July 25th. 1866; which patent was duly and properly issued unless the pre-emption declaratory statement of William A. Mills, hereinbefore set forth, excepted the said lot from the lands granted by the said Act of July 25th, 1866.

Item. 24. The grant made by the said Act of July 25th, 1866, is in course of adjustment by the Secretary of the Interior and the proper officers of the United States, but has not been finally adjusted; and, including all the lands described in the bill of complaint herein,

the defendant has not received the full quantity of land promised in the grant made by the said Act of July 25th, 1866.

Item 25. It is further agreed that this stipulation is, and shall always be deemed, conclusive evidence, for the purposes of this suit, of the truth of all the matters and the things in its stipulated and agreed to be true, as fully and effectually as if each and all of such matters and things were, or had been, conclusively proven by the introduction and the testimony of witnesses; but each party reserves the right to introduce further and additional testimony and evidence.

Dated and signed on June 3, 1902.

JOHN K. RICHARDS,
Acting Attorney General
WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendants.
JOHN H. HALL,
United States Attorney.

Filed June 13th, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 22d day of September, 1902, there was duly filed in said court, a stipulation to correct stipulation of facts, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Stipulation to Correct Stipulation of Facts.

It is mutually agreed that an order may be entered directing the clerk of this court to correct the "Stipulation of Facts" on file herein, as follows:

1st. By striking from "Item 15," paragraph "(a)," in line 14, the words "filed and."

2d. By striking from "Item 19," paragraph "(a)," in line 7, the words "filed and."

3d. By striking from "Item 23," paragraph "(a)," in lines 9 to 12 inclusive, the words, "which declaratory statement was on file and of record, uncanceled, in the said land office, at the time the map referred to in the next preceding paragraph was filed and approved."

Dated and signed on Sept. 22, 1902.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for the Defendant.

Filed September 22d, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of December, 1902, there was duly filed in said court, a stipulation of additional facts, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Stipulation of Additional Facts.

It is stipulated and agreed that the following is a true and correct statement of the consideration prices received by the defendant for the several land sales set forth in the "Stipulation of Facts" heretofore filed in this cause; that is to say:

1. Lot 1 of section 15, township 3 south, range 1 east, was sold and conveyed as set forth in Item 11, paragraph "c" of the said stipulation of facts, for the full consideration sum or price of twenty-seven dollars and eighty cents ($27.80), paid unto the defendant.

2. The W. ½ of SE. ¼ of section 9, township 5 south, range 1 east, was sold under credit contract, as set forth in Item 12, paragraph "c" of the said stipulation of facts. The agreed purchase price was and is two hundred and forty (240) dollars, of which fifty-six (56) dollars only has been paid to the defendant.

3. The SW. ¼ of NW. ¼ of section 3, township 2 south, range 2 east, was sold and conveyed as set forth in Item 14, paragraph "c" of the said stipulation of facts, for the full consideration sum or price of one hundred and eight (108) dollars, paid unto the defendant.

4. The SE. ¼ of NE. ¼ of section 21, township 4 south, range 2 east, was sold and conveyed as set forth in Item 15, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest, of one hundred and twelve dollars and forty-five cents ($112.45), paid unto the defendant.

5. The NE. ¼ of SE. ¼ of section 21, township 4 south, range 2 east, was sold and conveyed as set forth in Item 15, paragraph "d" of the said stipulation of facts, for the full consideration price of seventy-two (72) dollars, paid unto the defendant.

6. Lot 1 of section 7, township 5 south, range 2 east, was sold and conveyed as set forth in Item 16, paragraph "c" of the said stipulation of facts, for the full

consideration price, principal and interest, of eighty-four dollars and thirty-seven cents ($84.37), paid unto the defendant.

7. The SW. ¼ of section 1 south, range 3 east, was sold and conveyed as set forth in Item 17, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest, of three hundred and ninety-three dollars and ninety-two cents ($393.92), paid unto the defendant.

8. The SE. ¼ of SE. ¼ of section 35, township 2 south, range 2 west, was sold and conveyed as set forth in Item 18, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest, of two hundred and twelve dollars and fifty-six cents ($212.56), paid unto the defendant.

9. The E. ½ of NW ¼ of section 19, township 2 south, range 2 west, was sold and conveyed as set forth in Item 19, paragraph "c" of the said stipulation of facts, for the full consideration price of one hundred and ninety (190) dollars, paid unto the defendant.

10. The W. ½ of NW. ¼ of section 19, township 2 south, range 2 west, was sold and conveyed as set forth in Item 19, paragraph "d" of the said stipulation of facts, for the full consideration price, principal and interest, of five hundred and twenty-four dollars and ten cents ($524.10), paid unto the defendant.

11. The W. ½ of SW. ¼ of section 35, township 9 south, range 3 west, was sold and conveyed as set forth in Item 20, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest,

of five hundred and seventy-three dollars and fourteen cents ($573.14), paid unto the defendant.

12. The N. ½ of SW. ¼ of section 9, township 18 south, range 5 west, was sold and conveyed as set forth in Item 21, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest, of six hundred and twenty dollars and twenty-six cents ($620.26), paid unto the defendant.

13. The SW. ¼ of NE. ¼ and NW. ¼ of SE. ¼ of section 3, township 10 south, range 6 west, was sold and conveyed as set forth in Item 22, paragraph "c" of the said stipulation of facts, for the full consideration price, principal and interest, of three hundred and twenty-four dollars and thirty cents ($324.30), paid unto the defendant.

14. The SW. ¼ of SE. ¼ of section 3, township 10 south, range 6 west, was sold and conveyed as set forth in Item 22, paragraph "d" of the said stipulation of facts, for the full consideration price, principal and interest, of two hundred and twenty-six dollars and fifty cents ($226.50), paid unto the defendant.

Dated and signed on November 20th, 1902.

JOHN H. HALL,
United States Attorney for Oregon.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for Defendant.

Filed December 3d, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of December, 1902, there was duly filed in said court, a stipulation excepting certain lands, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Stipulation Extending Certain Lands.

It is hereby stipulated and agreed by and between the parties hereto that the following described lands claimed by the Government in its bill of complaint herein, shall be excepted from said suit, and that the United States will make no further claim to the same, and the title thereof may be confirmed in the defendant above named; said lands being described as the northeast ¼ of northeast ¼, section 11, township 39 S., R. 2 E., same having been patented by the United States to defendant on the 16th day of March, 1896. Also the northeast ¼ of the northeast ¼, the southwest ¼ of the northeast ¼, and the west ½ of section 5, township 23 S., R. 5 W., the same

having heretofore been patented by the United States to defendant.

JOHN H. HALL,
Attorney for United States.
WM. SINGER, Jr., and
WM. D. FENTON,
Attorneys for Oregon and California Railroad Company.

Filed December 3d, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of December, 1902, there was duly filed in said court, a stipulation submitting case in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Stipulation Submitting Case.

It is stipulated and agreed, that this case may be submitted on the pleadings, stipulation of facts, stipulation of additional facts, papers on file and orders made in the case, and briefs to be filed within sixty days by

the complainant and within sixty days thereafter by the defendant.

Dated and signed December 20th, 1902.

JOHN H. HALL,
United States Attorney for Oregon.
WM. D. FENTON, and
WM. SINGER, Jr.,
Attorneys for the Defendant.

Filed December 3d, 1902. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 12th day of December, 1904, the same being the 61st judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

No. 2657.
Dec. 12, 1904.

Decree.

This cause having heretofore come regularly on for trial, complainant appearing by John H. Hall, United

States Attorney and defendant appearing by W. D. Fenton and William Singer, Jr., the case was then submitted on a stipulated statement of facts signed by the parties and upon written briefs, and was by the Court taken under advisement until this time. Now, at this time the Court being fully advised as to the law and facts—

It is ordered, adjudged and decreed, that complainant have and recover of and from the defendant the sum of $1,010.35 as the value at $1.25 per acre of the following described real property to wit:

Lot 1, Sec. 15, Tp. 3 S., R. 1 E., containing 22.28 acres; W. ½ of the S. E. ¼ of Sec. 9, Tp. 5 S., R. 1 E., containing 80 acres; S. W. ¼ of N. W. ¼, Sec. 3, Tp. 2 S., R. 2 E., containing 40 acres; S. E. ¼ of N. E. ¼, and N. E. ¼ of S. E. ¼, Sec. 21, Tp. 4 S., R. 2 E., containing 80 acres, and Lot 1, Sec. 7, Tp. 5 S., R. 2 E., containing 26 acres; S. W. ¼ of Sec. 27, Tp. 1 S., R. 3 E., containing 160 acres; S. E. ¼ of S. E. ¼, Sec. 35, Tp. 2 S., R. 3 E., containing 40 acres; N. W. ¼, Sec. 19, Tp. 2 S., R. 2 W., containing 160 acres; W. ½ of S. W. ¼ of Sec. 35, Tp. 9 S., R. 3 W., containing 80 acres; the S. W. ¼ of N. E. ¼ and W. ½ of S. E. ¼, Sec. 3, Tp. 10 S., R. 6 W. of the Willamette Meridian, containing 120 acres, making a total of 808.28 acres.

And it is further ordered and decreed that the United States is the owner of the title in fee simple absolute and unincumbered of the following described lands set forth in plaintiff's complaint to wit:

W. ½ of the S. E. ¼ of Sec. 13, Tp. 6 S., R. 1 E. of the Willamette Meridian and Lot 8 of Sec., 15, Tp. 23 S., of R. 7 W. of the Willamette Meridian; and the patents

heretofore issued by the proper officers of the United State as set forth in plaintiff's complaint be, and the same are hereby, annulled, canceled, set aside and held for naught,

And it is further ordered and decreed, that defendant, its agents, servants and successors in interest are hereby forever enjoined and restrained from having or claiming to have any title, interest or estate, adverse to that of the United States in and to said lands, or any part thereof.

And it is further ordered, adjudged and decreed, that the title to the N. ½ of the S. W. ¼ of Sec. 9, Tp. 18 S. of R. 5 W. of the Willamette Meridian is hereby confirmed in defendant, and that the plaintiff hath no interest or title therein,

And it is further ordered and decreed that complainant have and recover of and from defendant its costs and disbursements of this suit taxed at $———; and that execution issue therefor.

CHARLES B. BELLINGER,

Judge.

Filed December 12th, 1904. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 12th day of December, 1904, there was duly filed in said court, an opinion, in words and figures as follows to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Opinion.

JOHN H. HALL, for the Government,
WM. D. FENTON and WM. SINGER, Jr., for the Defendant.

BELLINGER, J.—This is a suit to cancel patents, alleged to have been erroneously issued, for lands within the place limits of the grant of lands to the defendant company, made by Congress on July 25, 1866 (14 Stats. at Large, 239), and to recover the price of such of the lands so patented as may have been sold by the defendant to bona fide purchasers. The grant was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten such sections on each side of the line of road, and it provided that when any of said alternate sections should be found to have been "granted, sold, reserved, occupied

by homestead settlers, pre-empted, or otherwise disposed of," other lands in lieu thereof, designated by odd numbers and within ten miles of the limits of the first named sections, should be selected.

The particular lands in dispute are alleged to have been excepted from the grant, by reason of homestead and pre-emption claims subsisting at the time it became effective. There is one cash entry claimed, but it is alleged in the answer, and the fact seems to be conceded, that this entry was canceled, and there is no contention in the case respecting it.

There is also a claim, that of J. W. Dougherty, arising under the donation law. Dougherty's donation notification was filed on February 14, 1855. This claim was of record and uncanceled when the map of definite location was filed, but neither final proof nor payment had been made. The stipulation of facts is silent as to whether Dougherty was residing upon this donation at the time the map of definite location of defendant's road was filed, and without such residence the claim was abandoned. Final proof or continued residence was necessary to the life of this donation. The former is negatived by the stipulation of facts, and there is no presumption in favor of the latter. (O. & C. R. R. Co. vs. United States, 190 U. S. 186.) The facts relied upon to except the particular land from the grant must be shown, and in this case they are not shown.

Upon one of the parcels of land in question there were filed two pre-emption declaratory statements—one by John Morin on October 20, 1867, and one by Wm.

A. Mills on September 15, 1868. The amended stipulation of facts, as to the Morin filing, is that final proof or payment was never made or tendered under the filing made. The first stipulation of facts as to this pre-emption claim was that the declaratory statement was on file and of record, uncanceled at the time the map of definite location was filed. From the amended stipulation of facts, it must be presumed that the declaratory statement in question was canceled prior to the filing of the map, a fact which explains the later filing by Mills, so that further reference to Morin's filing is unnecessary.

There are seven pre-emption and four homestead claims relied upon by the Government to take the lands claimed out of the railroad grant. From the stipulation of facts, it appears that in all these cases the lands claimed have been sold by the company to bona fide purchasers, and there is no claim of interest in any of the original claimants, the contention being that, because of these claims, the grant did not attach to the particular parcels, and that upon the subsequent abandonment of these pre-emption and homestead claims, the land covered by them reverted to the Government.

It is argued for the railroad company that the lands upon which mere pre-emption filings, have been made are not pre-empted lands and within the exception of the grant, and the cases of Hutchins vs. Low 15 Wall. 77; Frisbie vs. Whitney, 9 Wall. 187, and Buxton vs. Travers, 130 U. S. 232 are cited to the effect that "Until payment and entry the Acts of Congress give to the

settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others."

The first of these cases was one where there was a settlement on unsurveyed lands in the State of California, with the intention on the part of the settler to acquire the same under the pre-emption laws of the United States. Thereafter Congress passed an Act granting to the state of California a tract of land for public use, resort and recreation, which included the land so settled upon. It was held, following the earlier case of Frisbie vs. Whitney, that mere occupation and improvement of any portion of the public lands, with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper, and that this power in Congress only ceases when all the preliminary acts, prescribed by those acts for the acquisition of the tile, including the payment of the price of the land, have been performed by the settler. These cases are commented upon and approved in the later case of Buxton vs. Travers, where it is decided in effect, that if a settler upon unsurveyed lands, within a specified time after the surveys are made, makes application to purchase, that is, files a declaratory statement such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, including the payment of its price, he acquires for the

first time a right of pre-emption to the land, that is a right to purchase it in preference to others.

It does not follow from what is decided in these cases, that the word "pre-empted" as used in excepting lands from railroad or other grants is necessarily restricted to such lands as have been paid for. The cases cited did not involve the definition to be given the word "pre-empted." The question decided was that mere occupation and improvement of unsurveyed lands with a view to pre-emption, conferred upon the settler no right as against the United States, and did not impair the power of Congress to dispose of the land settled upon in any way it might deem proper. The question to be decided in this case is, whether the exception out of the grant in question of "pre-empted" lands included lands upon which pre-emption filings have been made and accepted by the land office in compliance with the laws relating to pre-emptions.

The defendant refers to the several acts granting lands to the Union and Central Pacific Railroad Companies, the Texas Pacific, Northern Pacific, Atlantic and Southern Pacific, and the Oregon Central Railroad Company, as to which it has been uniformly held that lands covered by pre-emption filings were within the exceptions from the grants of "pre-emption or other claims," "pre-emption or homestead rights," and lands "to which a pre-emption or homestead claim is found attached." The difference between these exceptions and that under consideration is urged to show that the lands covered by pre-emption filings were subject to the

defendant's grant and properly patented to the company. But it is a rule of statutory construction, that statutes having similar objects are to be construed alike, and so the construction which has been put upon acts of similar subjects, even though the language should be different, should be referred to. (Endlich on Interpretation of Statutes, sec. 52.) These statutes taken together disclose the policy of the Government in making exceptions of lands from railroad grants. It is against sound policy that the settlement and consequent development of the country should be retarded by withholding large portions of the public lands from settlement under the pre-emption and homestead laws until such time as it can be known by the location of the lines of the aided railroads whether the grants will attach to them. The public inconvenience that would result from the withdrawal of all the alternate odd-numbered sections of public land to await the location of a land grant railroad, is illustrated in the present case. This grant was made in 1866. The first, second, and third sections of the road were located in the years 1870-1871. The maps of location of the remaining seven sections were filed in 1882, 1883, and 1884. Prior to the location of the line of road, the limits of the grant could not, of course, be known, and upon the construction of this statute contended for by the defendant, an intended pre-emptioner, who had settled upon and improved his pre-emption claim, as he is required to do before he can file his declaratory statement, would run the risk of being cut off in his right notwithstanding

the utmost diligence on his part. Such a result would be contrary to the established policy of the Government and would result in a sacrifice of public interests. The considerations for this particular grant and the conditions relating to it were the same as in the other grants, and I am of the opinion that Congress intended at least the same exception in respect to pre-emption and homestead rights and claims in this case that it did in the others. I therefore interpret the word "pre-empted" used to designate land excepted from the grant in the act of July 25, 1866, to mean lands upon which pre-emption filings were made and accepted in conformity with law. The stipulation of facts does not state that these pre-emption claimants had settled upon and improved the lands covered by the pre-emption claims, but this must be presumed, inasmuch as the law does not permit the filing of declaratory notices without proof of such settlements and improvements.

The grant excepts lands occupied by "homestead settlers." It does not appear that the homestead claims relied upon were those of settlers, and there is no exception in terms in favor of homestead claimants, not settlers. I assume that this exception was intended to provide for persons who had settled upon the public lands, intending to enter the same as homesteads, but had not made the showing and application before the local land office and the payment necessary to give them a right under the homestead laws. (The latter act of 1872, R. S., section 2315, provides for settlers of this

class.) It does not follow that Congress intended to grant the lands of homesteaders, not settlers, who had fully complied with the law. Settlement is not a prerequisite to a homestead filing. A person qualified to become a homesteader is permitted to make his homestead application to the register of the local land office upon making the prescribed affidavit, and upon payment of a fee of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres. When the offer thus made has been accepted by the filing of the required affidavit and the homestead application, and by the payment of the fee provided for, the applicacant has acquired a vested right. The lands covered by the homestead application are "disposed of" within the exception in the grant. But whether within that exception or not, such lands are not subject to disposition by Congress in violation of the obligation which the Government has assumed to issue the patent to which the homesteader is "entitled" upon proof of the subsequent residence and cultivation required by law.

Two of the homestead applications in the case were made after the map of definite location was filed in the office of the Secretary of the Interior, and before approval by that office. The exception in the grant to the Northern Pacific Railroad Company was of lands not reserved, etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office," In the grant to the defendant company the exception is with reference

to the time when the company "shall file in the office of the Secretary of the Interior a map of the survey of said railroad," at which time it is provided that "the Secretary of the Interior shall withdraw from sale public lands herein granted," etc. The Supreme Court, construing the former of these grants, held that no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. (N. P. R. R. Co. vs. Saunders, 166 U. S. 620; U. S. vs. O. & C. Railroad Co., 176 U. S. 44.) There is nothing to distinguish the two grants so far as the effect that is to be given to the filing of the map of location is concerned. The construction that requires acceptance of the location as filed applies with equal force in each case. The grant, therefore, did not attach to the lands upon which homestead applications were made between the filing of the map of definite location and its approval by the Secretary of the Interior.

The act of March 3, 1887, provided for the concellation of patents wrongfully issued to railroad companies, for the issue of new patents to innocent purchasers, and for the recovery from such companies of the Government price for the lands so patented and sold. I conclude, contrary to the contention of the defendant, that the United States, under this act could, after cancellation of the erroneous patent, also recover from the companies the value of the land in question, since the cancellation provided for was not to remedy the wrong done to the United States, but was a step in a proceeding adopted to protect innocent purchasers from the conse-

quences of the companies' wrongful acts. To the same effect is the Act of 1896. The confirmation of title in the good faith purchasers is intended to right the wrongs done such purchasers, at the cost of the companies responsible therefor to the extent of the Government price of the lands surrendered by the United States for that purpose. It does not ratify the wrong done to the United States, but provides relief for the innocent purchaser against its consequences at the cost of the wrongdoer. These companies will not be heard in a court of equity to say, "we did not agree to pay for these lands. We took them and sold them without right. Your remedy is against our innocent grantees to get back what we had no right to convey. You cannot ratify their title without condoning our wrong."

This construction put upon the act of 1896 does not give it a retroactive effect. The act does not create a liability, but provides a means of enforcing one already existing.

As to the contention that the case is not one of equitable cognizance, it is enough to say that suits for cancellation are of equitable cognizance, and equity having taken jurisdiction for such purpose, may go on and grant the relief of pecuniary compensation if the facts disclosed in the trial should require it. But without this, the suit is expressly authorized by the Act of 1887 as amended by implication of the act of 1896.

The United States is entitled to recover the minimum Government price for the lands covered by the pre-

emption and homestead applications named in the bill of complaint, and such will be the decree.

Filed December 12th, 1904. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 28th day of February 1905, the same being the 127th judicial day of the regular October term of said court,—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.

No. 2657.
Feb. 28th, 1905.

Amended Decree.

Now, at this day, this cause comes on to be heard upon motion of defendant to amend the decree herein heretofore entered December 12th, 1904, the complainant appearing by W. W. Banks, Assistant United States Attorney, and the defendant appearing by Wm. D. Fenton, and it appearing to the Court that the west half of the southeast quarter of section 9, township 5, south,

range 1 east, containing eighty acres, was sold by defendant for $56.00 and no more, and that the said sum of $56.00 and no more was paid to defendant therefor; and it further appearing to the Court that the defendant should be charged in said sum of $56.00 instead of $100.00, and for the remaining 728.28 acres at the rate of $1.25 per acre:

It is therefore ordered, adjudged, and decreed, that the said original decree of December 12th, 1904, be, and the same is, hereby, amended so as to read as follows:

It is ordered, adjudged, and decreed, that complainant have and recover of and from the defendant the sum of $966.35 as the value at $1.25 per acre of the following described real property, to wit:

Lot 1, Sec. 15, Tp. 3 S., R. 1. E., containing 22.28 acres: SW. ¼ of NW. ¼, Sec. 3, Tp. 2 S., R. 2 E., containing 40 acres; SE. ¼ of NE. ¼, and NE. ¼ of SE. ¼, Sec. 21, Tp. 4 S., R. 2 E., containing 80 acres, and Lot 1, Sec. 7, Tp. 5 S., R. 2 E., containing 80 acres, and Lot 1, Sec. 7, Tp. 5 S., R. 2 E., containing 26 acres; SW. ¼ of Sec. 27, Tp. 1 S., R. 3 E., containing 160 acres; SE. ¼ of SE. ¼, Sec. 35, Tp. 2 S., R. 3 E., containing 40 acres; NW. ¼, Sec. 19, Tp. 2 S., R. 2 W., containing 160 acres; W.½ of SW. ¼ of Sec. 35, Tp. 9 S., R. 3 W., containing 80 acres; the SW. ¼ of NE. ¼ and W. ½ of SE. ¼, Sec. 3, Tp. 10 S., R. 6 W. of the Willamette Meridian, containing 120 acres, and the W. ½ of the SE. ¼ of Sec. 9, Tp. 5 S., R. 1 E., containing 80 acres at $56.00 for said tract, making a total of 808.28 acres.

And it is further ordered and decreed, that the United States is the owner of the title in fee simple, absolute and unincumbered of the following described lands set forth in plaintiff's complaint, to wit: W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 13, Tp. 6 S., R. 1 E. of the Willamette Meridian, and Lot 8 of Sec. 15, Tp. 23 S. of R. 7 W. of the Willamette Meridian; and the patents heretofore issued by the proper officers of the United States as set forth in plaintiff's complaint be, and the same are hereby, annulled, canceled, set aside and held for naught.

And it is further ordered and decreed, that defendant, its agents, servants and successors in interest, are hereby forever enjoined and restrained from having or claiming to have any title, interest or estate, adverse to that of the United States in and to said lands, or any part thereof.

And it is further ordered, adjudged and decreed, that the title to the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 9, Tp. 18 S. of R. 5 W. of the Willamette Meridian is hereby confirmed in defendant and that the plaintiff hath no interest or title therein.

And it is further ordered and decreed, that complainant have and recover of and from defendant its costs and disbursements of this suit taxed at $52.52; and that execution issue therefor.

CHARLES B. BELLINGER,
Judge.

Filed February 28, 1905. J. A. Sladen, Clerk.

And afterwards, to wit, on the 14th day of March, 1905, there was duly filed in said court, a cost-bill, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES,
vs.
OREGON AND CALIFORNIA RAILWAY COMPANY.

No. 2657.
March 14, 1905.

Cost-Bill.

Statement of disbursements claimed by the complainant in the above-entitled cause, viz:

Clerk's fees	$ 28.40
Marshal's fees	4.12
Costs in State Circuit Court	
Attorneys' fee	20.00
Attorney's fee for taking ——— depositions.	
Depositions	
Examiner's fees	
Referee's fees,	
Witness' fees	
Total taxed at	$ 52.52

J. A. SLADEN,
Clerk,
By G. H. Marsh,
Deputy.

District of Oregon—ss.

I, Wm. W. Banks, Assistant United States Attorney, being duly sworn, on my oath say that I am one of the attorneys for the United States in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said complainant is entitled to recover the same from the O. & C. R. R. Co., defendant, as I verily believe.

WM. W. BANKS.

Subscribed and sworn to before me this March 14, 1905.

J. A. SLADEN,
Clerk.

By G H. Marsh,
Deputy Clerk.

Filed March 14, 1905. J. A. Sladen, Clerk, United States Circuit Court.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Petition for Appeal.

The defendant, conceiving itself aggrieved by the decree made and entered herein on December 12, 1904, and amended decree made and entered herein February 25, 1905, giving judgment for plaintiff, hereby appeals from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this Court staying all further proceedings upon the said decree pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this Court.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for Defendant.

District of Oregon, }
State of Oregon. } ss.

Due service of the within petition for appeal is hereby accepted in said district and admitted to have been made upon complainant herein this 9th day of June, 1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, one of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney and Attorney for Complainant.

Filed June 9th, 1905. J. S. Sladen, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
} Case No. 2657.

Assignment of Errors.

In connection with its petition for allowance of appeal herein, the defendant makes and files this assign-

ment of errors made by the Court in its decree entered herein on December 12, 1904, and amended decree made and entered herein February 25th, 1905.

I.

1st. That except in so far as this is a suit brought to cancel a patent for the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 13, township 6 south, range 1 east, and Lot 8 of section 15, township 23 south, range 7 west, this is an action at law, in assumpsit; and the Court erred in assuming jurisdiction of such other separate and independent subject matters, because presented in the guise of a bill in equity.

II.

2d. That the Court erred in holding, adjudging or decreeing that the word "pre-empted," used in the Act of Congress of July 25th, 1866, granting lands to the defendant, to designate lands excepted from that grant, meant or included lands for which mere pre-emption declaratory statements had been filed.

3d. That the Court erred in holding, adjudging or decreeing that lands covered by pre-emption declaratory statement filings at time of definite location of the defendant's railroad, were by such mere filings excepted from the defendant's grant as lands "pre-empted."

4th. That the Court erred in presuming that all, or any, persons who filed pre-emption declaratory statements for lands described in the bill of complaint herein, were settlers on or who had improved the lands filed for.

5th. That the Court erred in concluding that preemption declaratory statements are not permitted to be filed without proof of settlement on an improvement of the land by the person filing; and herein that the Court erred in not taking judicial notice of the Interior Department rules and regulations permitting such filings to be made without any proof.

III.

6th. That the Court ered in holding, adjudging or decreeing, that the words "occupied by homestead settlers," used in the said Act of July 25th, 1866, to designate lands excepted from the grant to the defendant, meant or included lands covered by mere homestead filings, made by persons who did not occupy and were not settlers on the lands filed for.

7th. That the Court erred in holding, adjudging or decreeing, that lands covered by homestead filings at time of definite location of the defendant's railroad, were by such mere filings excepted from the defendant's grant as lands "occupied by homestead settlers."

8th. That the Court erred in holding, adjudging or decreeing, that the words "otherwise disposed of," used in the said Act of July 25th, 1866, to designate lands excepted from the grant to the defendant, meant or included lands covered by mere homestead filings, of persons not shown to have settled on or occupied such lands.

9th. That the Court erred in holding, adjudging or decreeing, that lands covered by homestead filings at

time of definite location of the defendant's railroad, were by such mere filings excepted from the defendant's grant as lands "otherwise disposed of."

IV.

10th. That the Court erred in deciding, adjudging or decreeing, that the defendant's grant did not attach to lands for which homestead filings or pre-emption filings were made between the filing and approval of the map of definite location of the defendant's railroad.

V.

11th. That the Court erred in deciding, adjudging or decreeing that any patent issued to the defendant for lands described in the bill of complaint, was issued erroneously, inadvertently, or by mistake.

12th. That the Court erred in ordering, adjudging or decreeing that the United States is the owner, by title in fee simple absolute or otherwise of the W. ½ of SE. ¼ of section 13, township 6 south, range 1 east, of lot 8, section 15 township 23 south, range 7 west, Willamette Meridian.

13th. That the Court erred in ordering, adjudging or decreeing the cancelation, annulment or setting aside of defendant's patents for the lands described in the next preceding (12th) paragraph hereof.

14th. That the Court erred in ordering, adjudging or decreeing that the defendant, its agents, servants or successors in interest, are forever enjoined or restrained from having or claiming to have any title, interest or

estate adverse to that of the United States, in and to the lands described in the 12th paragraph hereof.

VI.

15th. That the Court erred in deciding, or adjudging, that the defendant is indebted to the complainant in any sum whatever, or at all because of any demand or obligation shown by the bill of complaint or proved in the case.

16th. That the Court erred in ordering, adjudging or decreeing that complainant have or recover of or from the defendant, the sum of $966.35, or any sum, as the value at $1.25 per acre, or as any value, of the lands described in the said decree as containing a total of 808.28 acres, or any part thereof; with or without costs of suit.

Wherefore the defendant prays that the said decree be reversed and that the complainant's bill of complaint herein be dismissed.

WM. D. FENTON and
WM. SINGER, Jr.,
Attorneys for Defendant.

State of Oregon, }
District of Oregon. } ss.

Due service of the within assignment of errors is hereby accepted in said district and admitted to have been made upon complaint herein this 9th day of June,

1905, by receiving a copy thereof duly certified to as such by Wm. D. Fenton, one of attorneys for defendant.

WM. W. BANKS,
Assistant United States Attorney and Attorney for Complainant.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards to wit on Friday, the 9th day of June, 1905, the same being the 42d judicial day of the regular April term of said court—Present, the Honorable WILLIAM B. GILBERT, United States Circuit Judge presiding—the following proceedings were had in said cause, to wit:

United States Circuit Court, District of Oregon.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY.
Defendant.
Case No. 2657.

Order Allowing Appeal.

Having considered the defendant's petition for allowance of appeal and supersedeas from the decree made and entered herein on December 12, 1904, and amended

decree made and entered herein February 25th, 1905, together with the assignment of errors, on motion of Mr. Wm. D. Fenton, of counsel for defendant, the appeal of defendant is allowed as prayed, upon giving a bond in the sum of $1500.00, to be approved by this Court; which bond shall operate as a supersedeas from date of its approval.

Made and entered on June ninth, 1905.

WM. B. GILBERT,
Judge.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 9th day of June, 1905, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

United States Circuit Court, District of Oregon.

UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
Case No. 2657.

Bond on Appeal.

We, Oregon and California Railroad Company and R. Koehler, each of Portland, Oregon, are held and firmly bound unto the United States of America, complainant

above named, in the sum of fifteen hundred dollars, to be paid unto the said complainant; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. The Oregon and California Railroad Company, defendant above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and supersedeas, from the decree entered in the above-entitled suit on December 12, 1904, and amended decree made and entered herein February 25, 1905, and the condition of this obligation is, that if the said Oregon and California Railroad Company shall prosecute its appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages, interest and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeals good, thence this obligation to be void, otherwise to remain in full force.

Dated and signed on June 9th, 1905.

OREGON AND CALIFORNIA RAILROAD COMPANY. [Seal]

By R. KOEHLER,
Second Vice-President.

R. KOEHLER. [Seal]

State of Oregon,
County of Multnomah. } ss.

R. Koehler and ———, being duly sworn, each for himself, says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of and freeholder within the State and District of Oregon, and am worth the sum of fifteen hundred dollars, over and above all my just debts and liabilities, in property situated in said district, exclusive of property exempt from execution.

R. KOEHLER.

Subscribed and sworn to before me on June 9th, 1905.

[Seal] R. A. LEITER,

Notary Public in and for Multnomah County, Oregon.

The foregoing bond approved on June ninth, 1905.

WM. B. GILBERT,

Judge.

Filed June 9th, 1905. J. A. Sladen, Clerk, United States Circuit Court District of Oregon.

And afterwards, to wit, on the 6th day of July, 1905, there was duly filed in said court, a stipulation extending time to file transcript of record on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY,
Defendant.
No. 2657.

Stipulation Extending Time to File Transcript.

It is hereby stipulated that the time of defendant may be enlarged thirty days in which to file the transcript herein on appeal, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 6th, 1905.

FRANCIS J. HENEY,
United States District Attorney and Attorney for Complainant.

WM. D. FENTON,
Attorney for Defendant.

Filed July 6th, 1905. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on Thursday, the 6th day of July 1905, the same being the 63d judicial day of the regular April term of said court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY.
Defendant.

Case No. 2657.
July 6th, 1905.

Order Extending Time to File Transcript.

Upon stipulation of parties herein by their respective attorneys—

It is ordered that the time of defendant in which to file the transcript on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged thirty days.

JOHN J. DE HAVEN,
Judge.

Clerk's Certificate to Transcript.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 133, inclusive, contain a full true, and complete transcript of the record and proceedings had in said court, in cause No. 2657, The United States of America, Plaintiff and Appellee, vs. The Oregon and California Railroad Company, Defendant and Appellant, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is seventy-five and 10/100 dollars, and that the same has been paid by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 24th day of July, A. D. 1905.

[Seal] J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

[Endorsed]: No. 1225. United States Circuit Court of Appeals for the Ninth Circuit. The Oregon and California Railroad Company, Appellant, vs. The United States of America. Transcript of Record. Upon Appeal from the Circuit Court of the United States for the District of Oregon.

Filed August 4, 1905.

F. D. MONCKTON,

Clerk.

No. 1227

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

FILMER BROS. CO., PRINTERS, 424 SANSOME ST., S. F.

INDEX

In the United States Circuit Court of Appeals for the Ninth Circuit.

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Respondent.

Order Extending Return Day.

Now, on this 8th day of June, 1905, the above-entitled cause coming on to be heard before the Judge of the District Court for the Territory of Alaska, Third Division, at Fairbanks, Alaska, upon the petition of the appellants, appearing by their counsel, Messrs. Claypool, Stevens, Kellum & Cowles, and the respondent, Jennie C. McKenzie, appearing by her counsel, Messrs. McGinn & Sullivan, the said appellants request an order extending the time within which to docket said cause and to file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and show that the same is necessary by reason of the great distance, slow and uncertain communication between said Fairbanks, Alaska, and the city of San Francisco, California; and the said Judge of said court, upon hearing the said motion, and being fully advised in the premises, and considering that good cause has been shown for the granting of the same.

It is hereby ordered that the time within which the said appellants shall docket said cause on appeal and the return day named in the citation issued by this court be enlarged and extended to and including the 1st day of August, 1905.

JAMES WICKERSHAM,

Judge of the District Court for Territory of Alaska, Third Division.

Due service of the within order and receipt of a copy thereof is hereby admitted this 8 day of June, 1905.

McGINN & SULLIVAN,

Attorneys for Respondent Jennie C. McKenzie.

[Endorsed]: No. 1227. United States Circuit Court of Appeals, for the Ninth Circuit. Hugh Madden et al. vs. Jennie C. McKenzie. Order Extending Return Day. Filed Aug. 7, 1905. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Respondent.

Further Order Extending Return Day.

Now, on this first day of August, A. D. 1905, the above-entitled cause coming on to be heard before the Judge

of the District Court for the Territory of Alaska, Third Division, at Fairbanks, Alaska, upon the petition of the appellants, appearing by their counsel Messrs. Claypool, Stevens, Kellum and Cowles, and the respondent, Jennie C. McKenzie, appearing by her counsel Messrs. McGinn and Sullivan, the said appellants request an order to further extend the time within which to docket said cause, and to file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, and show that the same is necessary by reason of the great distance and uncertain communication between the town of Fairbanks, Alaska, and the said city of San Francisco, California, and that due diligence has been used upon the part of appellants to docket said case within the time heretofore allowed, to wit, August 1, A. D. 1905; and the said Judge of said District Court, upon hearing the said motion, and being fully advised in the premises, and considering that good cause has been shown for the granting of the same, and no objection being made by counsel for the respondent:

It is hereby ordered that the time within which the said appellants shall docket said cause on appeal and the return day required in the citation issued by this Court, and in the order heretofore made extending the return day, be enlarged and extended to and including the first day of September, A. D. 1905.

JAMES WICKERSHAM,
Judge of the District Court for the Territory of Alaska,
Third Division.

Service of the foregoing order admitted, and the receipt of a copy thereof acknowledged this first day of August, A. D. 1905.

McGINN & SULLIVAN,
Attorneys for Respondent.

[Endorsed]: 1227. In the United States Circuit Court of Appeals, for the Ninth Circuit. Hugh Madden and William Donohue vs. Jennie C. McKenzie. Further Order Extending Return Day. Filed Aug. 29, 1905. F. D. Monckton, Clerk.

In the District Court for Territory of Alaska, Third Division.

JENNIE C. McKENZIE,
Plaintiff,
vs.
HUGH MADDEN and WILLIAM DONAHUE,
Defendants.

Stipulation as to Printing.

It is hereby stipulated and agreed that in the printing of the record herein for consideration of the court on appeal, that the title of the court and cause in full on all papers shall be omitted, excepting the first page, and insert in the place and stead thereof "*title of court and cause.*"

Dated this 8th day of July, 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.
CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

[Endorsed]: No. 1227. United States Circuit Court of Appeals, for the Ninth Circuit. Hugh Madden et al. vs. Jennie C. McKenzie. Stipulation Relative to Printing Record. Filed Aug. 7, 1905. F. D. Monckton, Clerk.

United States of America,
Territory of Alaska, } To wit:
Third Division.

At a special term of the District Court for the Territory of Alaska, Third Division, begun and held at the courthouse in the town of Fairbanks, Alaska, on the 10th day of April, and being the first day of June in the year of our Lord one thousand nine hundred and five, and within the said term. Present: The Honorable JAMES WICKERSHAM, District Judge. Among other things were the following proceedings, to wit:

In the District Court for Territory of Alaska, Third Division.

JENNIE C. McKENZIE,
Plaintiff,
vs.
HUGH MADDEN and WILLIAM DONOHUE,
Defendants. } No. 315.

Complaint.

Plaintiff, for cause of suit against the above-named defendants, complains and alleges:

I.

That on the 23d day of September, 1904, plaintiff and the defendants entered into an agreement in writing wherein and whereby the said defendants, for and in consideration of a monthly rental to be paid by the plaintiff to the defendants, as in said agreement in writing set forth, did lease, demise and let unto the plaintiff for a term to expire one year from the 23d day of September, 1904, to wit, on the 23d day of September, 1905, with the privilege of a renewal for a like term upon the same conditions, the following described property, to wit:

All of the second story of the building known as the Madden Hotel, consisting of 19 rooms, situated on the easterly one-half of Lot 14, in Block One, east, facing and abutting Front Street and extending in a southerly direction towards Second Avenue, a distance of 110 feet, and no more. Which said agreement in writing is in words and figures as follows, to wit:

"This indenture, made this 23d day of September, A. D. 1904, witnesseth:

That Hugh Madden and William Donahue of Fairbanks, Alaska, lessors, do hereby lease, demise and let unto Jennie C. McKenzie, of said city and District, lessee, the following described premises, to wit:

All of the second story of the building known as the "Madden House," consisting of nineteen rooms, situate on the easterly one-half (½) of Lot Four (4) in block One (1) east, facing and abutting Front Street, and extend-

ing in a southerly direction toward Second Avenue, a distance of one hundred and ten (110) feet, and no more.

To have and to hold for the term of one (1) year, to wit, from the 23d day of September, 1904, to the 23d day of September, 1905, with the privilege of leasing the same for another year upon the same terms, if the said lessors Hugh Madden and William Donahue, are then the owners of said building, yielding and paying therefor the rent of twenty-four hundred dollars ($2400.00) lawful money of the United States of America, as follows: Two hundred dollars ($200.00) on the 23d day of each and every month during said term in advance; and the said lessee promises to pay said rent in such lawful money, as follows, to wit, the sum of two hundred dollars ($200.00) monthly in advance; and to quit and deliver up the premises to the lessors or their agent or attorney, peaceably and quietly at the end of the term, in as good order and condition, reasonable use and wear thereof and damage by the elements excepted, are now or may be put into, and to pay the rent as above stated during the term; also the rent as above stated for such further time as the lessee may hold the same; and not to make or suffer any waste thereof, nor permit any person or persons to improve the same or make or suffer any alteration therein without the approbation of the lessors thereto in writing having been first obtained; and that the lessors or their agent may enter to view and make improvements, and to expel the lessee if she shall fail to pay the rent as aforesaid or to make or suffer any strip or waste thereof;

And it is further agreed between the parties hereto that as a part of the consideration for this lease, the said Jennie C. McKenzie is to furnish a furnace and all necessary apparatus and fixings sufficient and necessary to heat the whole of said building, the said lessors agreeing to put the same in working condition and to pay all the expenses thereof, and to furnish all fuel necessary for heating said building during the said term.

And it is further agreed between the parties hereto that in case of the sale of the said building or premises by the lessors, that upon thirty (30) days' notice to quit by the said lessors to the said lessee, in writing, then this lease shall immediately become void, and the said lessee shall vacate the said premises at the end of said thirty days; and should default be made in the payment of any portion of said rent when due and for three (3) days thereafter, the said lessors, their agent, or attorney, may re-enter and take possession, and at their option terminate this lease.

In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

(Sd) HUGH MADDEN.
WILLIAM E. DONOHUE.
JENNIE C. McKENZIE.

In the presence of:

M. L. SULLIVAN.
EDGAR WICKERSHAM.

United States of America,
District of Alaska. } ss.

This is to certify that before me, M. L. Sullivan, a notary public in and for the District of Alaska, duly commissioned and sworn, personally came Hugh Madden, William Donahue and ——— McKenzie, to me known to be the individuals described in, and who executed the foregoing lease, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

Witness my hand and official seal this 23d day of September, 1904.

[Notarial Seal] (Sd) M. L. SULLIVAN,
Notary Public in and for the District of Alaska.

II.

That immediately upon the execution of said agreement of sale the plaintiff entered into the possession of said property above described, and ever since said time has been and now is entitled to the possession of the same; that ever since said 23d day of September, 1904, the plaintiff has been in possession of said property, save and except that on the 29th day of May, 1905, the defendants herein, and while the plaintiff was in the quiet and peaceable enjoyment of said premises, wrongfully and unlawfully and by force and violence and by threats of force and violence ejected and ousted the plaintiff from the possession of the same.

III.

That the plaintiff herein has in all respects complied with said agreement and with each and all of the conditions thereof, and has paid the installments of rent, therein specified upon the 23d day of each and every month, since said lease was executed, and on the 23d day of May, 1905, the plaintiff paid to the defendants the sum of two hundred dollars ($200.00), being the rent in advance for said premises for the month ending June 23d, 1905, and the said defendants did receive and accept said money in full payment of the rent for the month to expire on the 23d day of June, 1905, and gave their receipt therefor.

IV.

That on the 29th day of May, 1905, and while the plaintiff herein was in the quiet and peaceable possession of the property herein described, under and by virtue of the lease aforesaid, the defendants herein, without the consent and against the protest of this plaintiff, did wrongfully and unlawfully and by force and with threats of force and violence, oust and eject the plaintiff from the possession of said premises, and ever since said time have and do now wrongfully, unlawfully and forcibly withhold the possession of said premises from the plaintiff, and do threaten and assert that the lease herein described is terminated and forfeited, and that the plaintiff shall not be permitted to again enter upon or be permitted to continue in the possession of said premises.

V.

That the defendants and each and both of them, are insolvent and unable to respond in damages in any sum whatsoever that might be recovered by the plaintiff against the defendants, by reason of the acts aforesaid. And unless an order of this Honorable Court is made restraining and prohibiting the defendants and each of them and all persons claiming by, through or under them, from going upon and withholding the possession of said premises, from this plaintiff, and unless an order of this Honorable Court is made restoring the plaintiff to her said possession, the plaintiff will suffer great and irreparable loss and injury.

VI.

That the plaintiff has no plain, adequate or speedy remedy at law.

VII.

That by reason of the acts aforesaid the plaintiff has been damaged in the sum of five hundred dollars ($500.00).

Wherefore the plaintiff prays a decree of this Honorable Court ordering and adjudging:

(1) That the plaintiff is entitled to the immediate possession of the premises herein described, and that the same be forthwith returned to her.

(2) That the defendants, and all persons claiming by, through or under them, since the execution of said lease, be restrained and prohibited from in any way disturbing the possession of the plaintiff to said premises.

(3) That a mandatory injunction forthwith issue, restoring the plaintiff to the possession of said premises, and that said mandatory injunction, upon the final hearing of this cause may be rendered perpetual.

(4) That the plaintiff recover her costs and disbursements, and for such other and further relief as to this Honorable Court may seem just and equitable in the premises.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

United States of America,
District of Alaska, } ss.

I, Jennie C. McKenzie, being duly sworn say: I am the plaintiff in the within entitled action; that I have read the foregoing complaint, know the contents thereof and the allegations therein are true as I verily believe.

JENNIE C. McKENZIE.

Subscribed and sworn to before me this 31st day of May, 1905.

[Seal] E. S. McGINN,
Notary Public for District of Alaska.

Filed in the United States District Court, District of Alaska, Third Division. June 1, 1905. E. J. Stier, Clerk.

And on, to wit, the same day, in said court, among other things were the following proceedings:

[Title of Court and Cause.]

Order to Show Cause.

Be it remembered that on the 1st day of June, 1905, the plaintiff in the above-entitled action applied for an order based upon the complaint herein, citing and requiring the defendants and each of them to be and appear in this court on the 2d day of June, 1905, and show cause, if any, why a mandatory injunction should not be issued restraining and, prohibiting the defendants and each of them and all persons claiming by, through and under them from interfering with or molesting the plaintiff in the use and enjoyment of the premises in the complaint described, and why said plaintiff should not be restored to the full and complete control, use and benefit of said premises.

And it appearing to the Court from said complaint duly verified, that this is a proper case for the granting of an injunction restoring to the plaintiff the possession of the premises in the complaint described, and restraining and prohibiting the defendants and each of them from interfering in any way with the plaintiff's use, control and enjoyment of said premises, unless cause to the contrary be shown, it is therefore on motion,

Ordered and adjudged, that the defendants and each of them be and appear in this court and cause on the 2d day of June, 1905, at the hour of 10:00 o'clock A. M.,

to show cause, if any, why the order prayed for should not be granted.

And said defendants are hereby notified that if at said time they fail to appear and show cause why such an order should not be made, that this Court will make an order restoring the plaintiff to the possession of the property described in the complaint herein, and shall enjoin the defendants and each of them from molesting the plaintiff in her use and enjoyment of said premises in any way.

Done in open court at Fairbanks, Alaska, this 1st day of June, A. D. 1905.

JAMES WICKERSHAM,
District Judge.

Entered Journal No. 3, page 415, June 1st, 1905.

Filed in the United States District Court, District of Alaska, 3d Division. June 1, 1905. E. J. Stier, Clerk.

And on, to wit, the 2d day of June, 1905, the same being one of the regular judicial days of said April, 1905, term of said Court, among other the following proceedings were had:

[Title of Court and Cause.]

Motion to Dismiss.

Come now the defendants in the above-entitled cause and in response to the application for a writ of restitution and order of injunction herein, move the Court to dismiss said cause upon the grounds:

1st: That this Court has no jurisdiction of the defendants herein, or either of them.

2d. That this Court has no jurisdiction of the subject matter herein.

3d: That according to the allegations contained in plaintiff's complaint, plaintiff has a plain, speedy and adequate remedy at law.

4th: That plaintiff's complaint does not state facts sufficient to constitute a cause of action against defendants, or either of them, in favor of plaintiff.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

Filed in United States District Court, District of Alaska, 3d Division, June 2, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Order Overruling Motion to Dismiss.

And now, to wit, June 2d, 1905, this action coming on to be heard on the motion of the defendant to dismiss, the Court after hearing argument of counsel of both parties, overrules said motion, to which defendant excepts, and exception allowed.

Entered Journal, No. 3, page 427, June 2d, 1905.

[Title of Court and Cause.]

Demurrer.

Come now the defendants in the above-entitled action, and demur to the complaint of plaintiff herein, and for grounds of demurrer say:

I.

That the Court has no jurisdiction of the person of the defendants, or of the subject of this action;

II.

That the complaint of plaintiff herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendants, or either of them.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

Filed in the United States District Court, District of Alaska, 3d Division. June 2, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Order Denying Demurrer.

And now, to wit, June 1st, 1905, this cause coming on to be heard on the demurrer of the defendant to the complaint filed herein, the Court after hearing argument of counsel of both parties, denies the demurrer, to which the defendant excepts, and exception is allowed.

Entered Journal, No. 3, page 427, June 1st, 1905.

[Title of Court and Cause.]

Answer.

Come now the defendants in the above-entitled cause, and answering the complaint of plaintiff herein, say:

I.

Defendants admit the allegations contained in paragraph one of said complaint of plaintiff.

II.

Defendants deny each and every allegation contained in paragraph two of plaintiff's said complaint.

III.

Defendants admit the allegations contained in paragraph three of plaintiff's said complaint, excepting that defendants deny that plaintiff has in all respects complied with said agreement, and with each and all of the covenants thereof, as alleged in said paragraph.

IV.

Defendants deny the allegations contained in paragraph four of said complaint, saving and excepting that they admit that on or about the 29th day of May, 1905, defendants, without the consent of plaintiff, took possession of said premises, and ever since said time have been, and now are in possession of the same, to the exclusion of the plaintiff, and admit that the defendants assert that said lease, in said complaint described, has been terminated and forfeited by plaintiff, and that plaintiff shall not be permitted to again enter upon, or be permitted to continue in the possession of the same.

V.

Defendants deny each and every allegation contained in paragraph five of said complaint of the plaintiff.

VI.

Defendants deny each and every allegation contained in paragraph six of said complaint of plaintiff.

VII.

Defendants deny that by reason of the acts complained of in said complaint of plaintiff, that plaintiff has been damaged in the sum of five hundred dollars ($500.00) or any other sum, as alleged in paragraph seven of said complaint, or otherwise.

And for further answer, and as an affirmative defense to said complaint of said plaintiff, defendants allege:

1. That on the 23d day of September, A. D., 1904, plaintiff and defendants entered into an agreement in writing as set forth in paragraph one of plaintiff's complaint herein.

2. That immediately upon the execution of said agreement plaintiff entered into the possession of the property described in said lease, and ever since said date until the 29th day of May, A. D. 1905, occupied said premises as a lodging-house, and furnished a portion of the furniture for the rooms of said second story of said premises.

3. That at the time of the execution of said lease the defendants were conducting, and ever since said time have conducted, are now conducting, and expect to continue to conduct on the first floor of said Madden

House, and immediately under the premises claimed by plaintiff in said lease, a retail liquor business.

4. That after the date of the execution of said lease, and the taking possession of said premises thereunder by plaintiff, to wit, on or about the 26th day of September, A. D. 1904, plaintiff and defendants made and entered into an oral agreement, which oral agreement substituted in part, and took the place of said lease above described, wherein it was mutually agreed between the said parties thereto that said new agreement should comprehend and embrace all of the terms indicated in said written lease, concerning plaintiff's occupancy of said premises, as therein stated, and in addition to the terms therein stated plaintiff should at all times until September 23, 1905, use her best efforts to keep all of said rooms in said premises occupied as a hotel or lodging-house by persons most likely to patronize the bar of defendants, immediately under said rooming-house, and that plaintiff further agreed that she would personally occupy said premises and manage said rooming-house, and as a consideration for the same plaintiff was to receive, and did receive, all liquors sent to her apartments in said building at half rates, and further received from defendants' bar a commission of twenty-five per cent (25%) on all liquors, cordials, and other drinks, as well as cigars purchased by her, or sent to her apartments in said premises.

5. That all of the terms of said agreement were carried out upon the part of plaintiff and defendants until about the 28th day of May, A. D. 1905, when plaintiff,

V.

Defendants deny each and every allegation contained in paragraph five of said complaint of the plaintiff.

VI.

Defendants deny each and every allegation contained in paragraph six of said complaint of plaintiff.

VII.

Defendants deny that by reason of the acts complained of in said complaint of plaintiff, that plaintiff has been damaged in the sum of five hundred dollars ($500.00) or any other sum, as alleged in paragraph seven of said complaint, or otherwise.

And for further answer, and as an affirmative defense to said complaint of said plaintiff, defendants allege:

1. That on the 23d day of September, A. D., 1904, plaintiff and defendants entered into an agreement in writing as set forth in paragraph one of plaintiff's complaint herein.

2. That immediately upon the execution of said agreement plaintiff entered into the possession of the property described in said lease, and ever since said date until the 29th day of May, A. D. 1905, occupied said premises as a lodging-house, and furnished a portion of the furniture for the rooms of said second story of said premises.

3. That at the time of the execution of said lease the defendants were conducting, and ever since said time have conducted, are now conducting, and expect to continue to conduct on the first floor of said Madden

House, and immediately under the premises claimed by plaintiff in said lease, a retail liquor business.

4. That after the date of the execution of said lease, and the taking possession of said premises thereunder by plaintiff, to wit, on or about the 26th day of September, A. D. 1904, plaintiff and defendants made and entered into an oral agreement, which oral agreement substituted in part, and took the place of said lease above described, wherein it was mutually agreed between the said parties thereto that said new agreement should comprehend and embrace all of the terms indicated in said written lease, concerning plaintiff's occupancy of said premises, as therein stated, and in addition to the terms therein stated plaintiff should at all times until September 23, 1905, use her best efforts to keep all of said rooms in said premises occupied as a hotel or lodging-house by persons most likely to patronize the bar of defendants, immediately under said rooming-house, and that plaintiff further agreed that she would personally occupy said premises and manage said rooming-house, and as a consideration for the same plaintiff was to receive, and did receive, all liquors sent to her apartments in said building at half rates, and further received from defendants' bar a commission of twenty-five per cent (25%) on all liquors, cordials, and other drinks, as well as cigars purchased by her, or sent to her apartments in said premises.

5. That all of the terms of said agreement were carried out upon the part of plaintiff and defendants until about the 28th day of May, A. D. 1905, when plaintiff,

in violation of her agreement and said lease, without any notice or warning to defendants, moved all of the furniture of said premises, excepting about four rooms thereof, out of said premises so leased and occupied by her, and for the purpose of cheating and defrauding defendants, and hindering their said business, plaintiff then and there implored, advised and commanded the occupants of said premises to leave said premises and go with her to the rooming-house, dance-hall and saloon of Joe Ward, situate on Fourth and Cushman Streets, Fairbanks, Alaska.

6. Defendants further allege, that thereafter, and on the 29th day of May, 1905, defendant Donohue notified plaintiff that she had violated her contract with defendants, and the letter and spirit of said contract and lease, and that the said Donohue, being then the owner of said lease, declared the same forfeited.

7. Defendants further allege that therafter, and on, to wit, the 29th day of May, A. D. 1905, the defendant Donohue took possession of all of said premises peaceably, and while the said plaintiff was out of the possession of the same, and has ever since held possession thereof, and is now in possession of the same, and of all of said premises and occupying the same as a hotel and lodging-house.

8. That the real estate upon which said Madden House is located is claimed to be owned, and is in part owned by Fred E. Woitke, and that said building situate upon said premises is owned by the defendant Donohue, and that the said defendant Donohue now holds

possession of the real estate upon which said building is situate under and by virtue of a lease from the said Fred E. Woitke, and pays as ground-rent therefor the sum of five hundred and fifty dollars ($550.00) per month, and that the said defendant Donohue and the defendant Madden at the time of entering into said lease with the plaintiff owned said building, and held the ground upon which said building is located from the said Fred E. Woitke, as owner, under a written lease.

9. That plaintiff at all times since the execution of said lease has admitted the title of defendants, and defendants' grantee, the said defendant Donohue, as landlord, and has claimed no other source of title, right or interest therein.

10. Defendants are informed, believe and allege, that plaintiff owns an interest in the operation and profits of a competitive business to that of defendants, to wit, that certain saloon, dance-hall, and lodging house known as Joe Ward's, situate on Fourth Avenue and Cushman Street, in the Town of Fairbanks, Alaska, and has unlawfully, fraudulently, and with intent to financially ruin the defendants herein, entered into a conspiracy with the said Joe Ward and his associates, for the purpose of disposing of defendants' competitive business, and intended to, if allowed so to do, pay to defendants the rent called for in said lease, and keep during the term of said lease, said second story of said building closed, thereby cutting off the patronage due to defendants from said defendants' bar-room, thereby causing defendants to close their said saloon, and in

that event to cause the said defendant Donohue to lose the building situate on said premises for the nonpayment of said ground-rent to the said Fred E. Woitke, all against the rights of defendants herein.

11. Defendants allege that the defendant Donohue is wholly solvent, and is worth over and above his just debts, in property in Alaska not exempt from execution, in excess of the sum of ten thousand dollars, and is, therefore, able to respond in damages to plaintiff for any damages which she may sustain by reason of the acts complained of in her said complaint herein.

12. Defendants further allege, that plaintiff has a plain, speedy and adequate remedy at law.

13. That for a valuable consideration the defendant Madden did, on or about the 28th day of February, A. D. 1905, assign his interest in said lease and contract existing between plaintiffs, as lessee, and the said Madden and Donohue, as lessors, to the defendant Donohue.

14. That by reason of the wrongful and unlawful acts of plaintiff, as aforesaid, and the interruption and interference with the defendants' said business, the defendant Donohue has been damaged by plaintiff in the sum of one thousand dollars ($1,000.00).

Wherefore defendants demand judgment against the plaintiff for one thousand dollars ($1,000.00) damages and for costs of suit.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

United States of America,
Territory of Alaska, } ss.
Third Division.

William Donohue, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

WILLIAM DONOHUE.

Subscribed and sworn to before me this 1st day of June, A. D. 1905.

[Seal] MORTON E. STEVENS,
Notary Public in and for Alaska, Residing at Fairbanks.

Filed in the United States District Court, District of Alaska, 3d Division. June 2, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Affidavit of William Donohue.

United States of America,
Territory of Alaska. } ss.

William Donohue, being first duly sworn, upon his oath deposes and says:

1st: That he is one of the defendants in the above-entitled action.

2d: That the plaintiff herein did not pay her rent of $200.00 for the premises claimed by her in the complaint herein on the 23d day of May, 1905, but paid the same on the 26th day of May, 1905, and obtained a receipt from affiant dated the 23d day of May, 1905, paying to the 23d day of June, 1905, and at said time plaintiff said nothing to affiant to indicate in any way that she intended to move from the Madden House or to move any of her furniture, and gave no warning whatsoever that she intended to close said rooming-house.

3d: That afterwards, to wit, in the afternoon of the 28th day of May, 1905, plaintiff began to make preparations for packing and moving her furniture, and moved the larger portion of said furniture on said day, and left in said building only the furniture in four rooms, which rooms were occupied by tenants who had paid their rent in advance, as affiant is informed and believes, and would not move.

4th: That affiant, upon discovering the plaintiff's moving from said building and taking her furniture from said premises and learning of her requesting and demanding of the tenants of said building to move with her to the saloon, dance-hall and rooming-house of Joe Ward on the corner of Fourth Avenue and Cushman Street, in Fairbanks, Alaska, affiant enquired of plaintiff what she was doing and why she was moving from said premises, and what she intended to do with the house, and plaintiff evaded the answer, but finally stated that she had possession of the house and it was her business as to what she would do with the same, as

she had her rent paid. She was apparently guarded in her statements and refused to talk or to give defendant any satisfaction as to her intention concerning said premises.

5th: Affiant then stated to plaintiff that she could not close up this house (meaning the Madden House) and notified plaintiff that he would take possession of the house and run it as soon as plaintiff left the premises;

6th: Affiant further states that before proceeding further in the premises he consulted his lawyers, and told them all of the facts as near as affiant knew at that time, and upon the advice of affiant's lawyers, affiant caused notice to be served upon plaintiff calling plaintiff's attention to her violation of the contracts and lease existing, and declared said lease and contracts forfeited. And afterwards, on the same day, to wit, the 29th day of May affiant, acting on the advice of counsel, finding said premises unoccupied, peaceably and without force entered into said premises, took possession of the same, secured furniture for the most of the rooms of the said Madden House, at a large expense to the defendants herein, and secured occupants for the rooms of said property, and has ever since maintained, and still maintains peaceable possession of said premises; and that affiant, as one of the defendants herein, is enjoying the benefits of having the upper story of said Madden House filled with tenants, and is enjoying the patronage of such tenants to the Madden House Bar.

7th: That affiant on said 29th day of May, after taking possession of said premises, notified plaintiff that he held the small remnant of furniture which she left in said premises subject to her orders; and immediately on said day plaintiff sent for the remnant of said furniture and took it from the premises in dispute. And affiant is informed and verily believes that she took it to the rooming-house of the said Joe Ward.

8th: Affiant further states that plaintiff has no property of any nature whatsoever in said Madden House; that she voluntarily left said premises and abandoned the same so far as making any use of said premises, and that she fully intended to close said premises to gratify her personal spite against defendants herein, and for the further purpose of carrying out, as affiant is informed and believes, a conspiracy entered into between plaintiff and the said Joe Ward, and his associates, to enhance the patronage of the said Joe Ward's place and to deprive defendants of the fruits of a business which defendants have, for the past year, been building, and thereby destroy a competition which then and which now exists;

9th: Affiant further states that he has at all times acted in the best of faith towards plaintiff; that he has been careful to act under the advice of his attorneys in the premises, and that the possession of said premises was obtained as aforesaid peaceably, and after the said plaintiff had left said premises; and at no time did affiant or his codefendant break the peace or use force in the premises.

WILLIAM DONOHUE.

Subscribed and sworn to before me this 2d day of June, A. D. 1905.

[Seal] MORTON E. STEVENS,
Notary Public for Alaska.

Filed in the United States District Court, District of Alaska, 3d Division. June 2, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Affidavit of Hugh Madden.

United States of America,
Territory of Alaska, } ss.
Third Division.

Hugh Madden, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the answer of defendants herein, knows the contents, and that the same is true as he verily believes.

That affiant is interested in the bar of the Madden House, immediately below the second story claimed by plaintiff herein; that each of said room are connected with the bar-room below by electric bells, from which defendants have heretofore derived, and still derive, a large and lucrative patronage from the occupants of the hotel, or rooming-house above said bar-room, and that the defendants would be wholly unable to pay the rent for said premises if the upper story of said building be closed.

That at the time of the payment of rent, to wit, on or about the 23d day of May, A. D. 1905, upon the part of plaintiff, paying to the 23d day of June, A. D. 1905, plaintiff gave no warning or indication whatsoever that she intended to vacate said premises, and that on or about the 28th or 29th day of May, A. D. 1905, without warning, as aforesaid, plaintiff began to move her furniture from the rooms of said hotel, and moved them to the saloon and rooming house known as Joe Ward's, in Fairbanks, Alaska, and affiant then and there protested. Plaintiff thereafter stated to affiant that she would put "you," meaning the defendants, "on the bum," meaning, as affiant verily believes, that she intended to financially ruin defendants, and do away with the competition to Joe Ward's saloon, in which business affiant is informed and believes, that plaintiff is interested.

Affiant further avers, upon information and belief, that defendants will be able to prove an unlawful conspiracy between plaintiff and the said Joe Ward and his associates, and that defendants will be able to prove by competent witnesses that the said Joe Ward stated, prior to the 29th day of May, A. D. 1905, "that he had interested Mrs. McKenzie, meaning plaintiff, in his enterprise; that the said Mrs. McKenzie was going to leave the Madden House and come to his place, bringing with her all the furniture of the Madden House, and the present tenants therein, and that the said Mrs. McKenzie had a lease from Madden and Donohue, and that they, meaning Mrs. McKenzie and the said Joe Ward, intended to pay the rent under said lease until the end

of the lease in September, which he could well afford to do, in order to dispense with the competition of the Madden House Saloon and Hotel."

Affiant further states that the defendants are unable to get such voluntary proof at this time, but that he believes he can prove the same by process of subpoena at the final trial of this cause.

Affiant further states that the defendants have been put to great expense, to wit, about the sum of $2,500.00, to secure furniture for about 19 rooms of said hotel, and have about filled said hotel or rooming-house with tenants, and if the Court would dispossess defendants at this time the same would work great and irreparable injury to defendants, and that plaintiff is wholly insolvent and unable to respond in damages in the premises.

HUGH MADDEN.

Subscribed and sworn to before me this 21st day of June, A. D. 1905.

[Seal] MORTON E. STEVENS.

Notary Public in and for Alaska, Residing at Fairbanks.

Filed in the United States District Court, District of Alaska, 3d Division. June 2, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Affidavit of Jack Reagan.

United States of America,
Territory of Alaska. } ss.

Jack Reagan, being duly sworn, upon his oath says:

That he is acquainted with the plaintiff and the defendants in the above-entitled cause; that on the 27th day of May, 1905, he was in the employ of William Donohue in the Madden House in Fairbanks, Alaska, and had been in such employ for about eight months last past, and that he is still in such employ in the capacity of floor manager on the first floor of said Madden House.

Affiant further states that he was at such time, and had been for some time last past, on very good terms with the plaintiff, and that the night of May 27, 1905, plaintiff called affiant into her apartments on the second story of the Madden House and inquired of affiant how much wages he was receiving downstairs, and affiant informed her that he was then receiving $10.00 per day, but that he expected to receive more wages as soon as business would pick up this spring and the coming summer. Plaintiff answered affiant saying that "Business will never pick up with this house [meaning the Madden House]. I have a lease on the place until next September, and I am going to move with my furniture to Joe Ward's dance-hall and lodging-house, and will keep these rooms bare, and see that no women occupy them. I want to get all of the girls I can to go

with me over there, and I will give them free room rent and will not charge them anything for rooms, and if you will come over with us we will give you $15.00 a day, with a guarantee for all summer, and you are to bring all the women you can with you, and I know you can bring several by talking to them." Plaintiff also stated to affiant that "We have the whole thing over there [referring to Joe Ward's dance-hall]. My friend George [meaning George Kran] and I own everything down there, and even if we do not make much at the start we can run just the same, while the others cannot. We will put this house out of business, as I control the upstairs." And affiant replied that "It is a cinch that they cannot run the downstairs of this house [meaning the Madden House] without the upstairs"; and plaintiff answered "Yes, that is right, and I intend to hold the upstairs." Affiant then replied to plaintiff in substance that Madden and Donohue had treated affiant in all respects satisfactorily, and gave him work during the winter when they could have employed other persons probably more advantageously than affiant, and that affiant did not care to change at this time, even on plaintiff's promise of better wages. Plaintiff then answered affiant that "Well, I think you are making a mistake, because you will see in a couple of weeks that the other house will be doing all the business, and this house [meaning the Madden House] will be doing nothing."

JACK REAGAN.

Subscribed and sworn to before me this 2d day of June, A. D. 1905.

[Seal] J. C. KELLUM,
Notary Public for Alaska.

Service admitted this 2d day of June, A. D. 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

Filed in United States District Court, District of Alaska, 3d Division. June 3, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now on this 8th day of July, 1905, came the defendants Hugh Madden and William Donohue, by their attorneys, Messrs. Claypool, Stevens, Kellum & Cowles, and the plaintiff Jennie C. McKenzie, also came by her attorneys, Messrs. McGinn & Sullivan, and the said defendants present their statement of facts and bill of exceptions for settlement herein on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which bill of exceptions consists of the foregoing typewritten pages of the testimony, consisting of affidavits filed in said cause and attached hereto; and there being no objections thereto upon the part of plaintiff, and no amendments proposed thereto; and the said proceedings and evidence as aforesaid being and constituting all of the evidence and proceedings in said cause, not of record; and inasmuch as the same does not

appear of record in said action and is correct in all respects and is hereby approved, allowed and settled, the same and the whole thereof is hereby made a part of the record herein.

Done in the same term of court as the trial thereof, and within the time allowed by order of said court, and by the same Judge who presided at the proceedings in said cause, this 8th day of July, A. D. 1905.

JAMES WICKERSHAM,
Judge.

[Title of Court and Cause.]

Motion for Judgment.

Comes now the above-named plaintiff and moves the Court for judgment on the pleadings in the above-entitled cause, for the reasons:

I.

That the answer filed by the defendants herein does not constitute a defense to the cause of action set forth in the complaint.

II.

That the cause of action set forth in plaintiff's complaint is admitted by the answer of the defendants.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

Service of a true copy of the within motion is hereby accepted this 5th day of June, 1905.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for the Defendants.

Filed in the United States District Court, District of Alaska, Third Division. June 5, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Judgment.

Be it remembered that on this 6th day of June, 1905, came on regularly for hearing the motion of the plaintiff for judgment on the pleadings in the above-entitled cause, McGinn & Sullivan, appearing as attorneys for the plaintiff and Claypool, Stevens, Kellum & Cowles, appearing as attorneys for the defendants.

And it appearing to the Court from the pleadings in the above-entitled cause, that on the 23d day of September, 1904, the defendants leased to the plaintiff the premises described in the complaint and hereinafter described, which said lease is in words and figures as is set forth in paragraph I of plaintiff's complaint; and, that immediately upon the execution of said lease and pursuant thereto, the plaintiff entered into the possession of said premises hereinafter described, and continued in the use, occupation and possession thereof until the 29th day of May, 1905, when the defendants wrongfully and unlawfully and against the consent of the plaintiff took possession of said premises, and ever since said time have been and now are in the possession of the same, to the exclusion of the plaintiff, and that the defendants assert that the plaintiff shall not be permitted to again enter upon, or be permitted to continue in the possession of the same.

And it further appearing to the Court from the pleading that said entry of the defendants is without right, and that the defendants now wrongfully and unlawfully withhold the possession of said premises from the plaintiffs;

Now, therefore, the Court, after hearing the arguments of counsel of the respective parties, and being fully advised in the premises, orders and adjudges:

I.

That the plaintiff is the legal owner of a legal estate for years in and to the property described in the complaint herein, described as follows:

All of the second story of the building known as the Madden Hotel, consisting of 19 rooms, situated on the easterly one-half (½) of lot 14, in block one, east, facing and abutting Front Street; and extending in a southerly direction towards Second Avenue, a distance of 110 feet, and no more. Situated in the town of Fairbanks, Alaska, which estate for years is to expire upon the 23d day of September, 1905, unless the plaintiff herein shall elect to continue the same in force for a period to expire on the 23d day of September, 1906.

II.

That the plaintiff is entitled to the present and immediate right to the possession of said premises, and that the defendants wrongfully withhold the same from her.

III.

That the plaintiff is entitled to recover her costs and disbursements herein, and that execution and a writ of

restitution may issue to enforce the provisions of this judgment.

Dated at Fairbanks, Alaska, this 8th day of June, A. D. 1905.

JAMES WICKERSHAM,
District Judge.

Entered Journal No. 3, page 438, June 8, 1905.

Filed in the United States District Court, District of Alaska, Third Division. June 5, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Assignment of Errors.

Come now the defendants, Hugh Madden and William Donohue, and file the following assignment of errors, upon which they rely:

I.

That the Court erred in denying defendants' motion to dismiss the above-enttiled cause.

II.

That the Court erred in overruling defendants' demurrer to plaintiff's complaint in said cause.

III.

That the Court erred in granting plaintiff's motion for judgment on the pleadings in said action.

IV.

That the Court erred in rendering and entering judg-

ment against defendants in favor of plaintiff in said action.

Wherefore, defendants Hugh Madden and William Donohue pray that the judgment or decree of said Court be reversed and set aside, or modified, and for such other relief as they are entitled to receive.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

Service of within admitted this 8th day of June, A. D. 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

Filed in the United States District Court, District of Alaska, Third Division. June 8, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Motion for Appeal.

Now on this 8th day of June, 1905, come the defendants, Hugh Madden and William Donohue, by their counsel, Messrs. Claypool, Stevens, Kellum & Cowles, and represent unto this Honorable Court that they feel themselves aggrieved by the rulings, decisions and judgment rendered in this cause, and that said judgment is one from which an appeal lies to the United States Circuit Court of Appeals, for the Ninth Circuit, and that they desire to appeal from this court in said cause to said Appellate Court.

Wherefore, defendants pray for an order of court allowing an appeal herein to said United States Circuit Court of Appeals for the Ninth Circuit; that the Court fix the amount of bond, and that the same be, when given and approved, a supersedeas as well as a bond for costs and damages on appeal.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Defendants.

Service of above admitted this 8th day of June, A. D. 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

Filed in the United States District Court, District of Alaska, Third Division. June 8, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Order Allowing Appeal.

Now on this 8th day of June, 1905, the same being one of the regular judicial days of the special term of this court, held at Fairbanks, Territory of Alaska Third Judicial Division, this cause coming on to be heard upon the petition of defendants, Hugh Madden and William Donohue, for an appeal, and the said defendants appearing by their counsel, Messrs. Claypool, Stevens, Kellum & Cowles, and the plaintiff appearing by her counsel, Messrs. McGinn & Sullivan, and the Court being advised in the premises:

It is ordered that the appeal of the defendants, Hugh Madden and William Donohue, in said cause, to the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby, allowed; and that a certified transcript of the record, evidence and exhibits, and all proceedings herein be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the return day of said appeal and citation be fixed at thirty days from the date hereof, and that said defendants, Hugh Madden and William Donohue, shall have thirty days from this date within which to prepare and file their statements of facts and bill of exceptions herein.

It is further ordered that the bond on appeal of the said Hugh Madden and William Donohue be, and the same is hereby fixed at the sum of five thousand dollars ($5,000.00) the same when given and approved to act as a supersedeas bond as well as a bond for costs and damages on appeal; and that all proceedings in said cause on execution or otherwise are hereby stayed.

JAMES WICKERSHAM,
Judge.

Entered Journal No. 3, page 439, June 8, 1905.

Filed in United States District Court, District of Alaska, Third Division. June 8, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Bond on Appeal.

Know all men by these presents, that we, Hugh Madden and William Donohue, of the town of Fairbanks, Territory of Alaska, as principals, and Daniel A. McCarty and David Fairburn, of the same place, as sureties, are held and firmly bound unto Jennie C. McKenzie, in the full and just sum of five thousand dollars ($5,000.00), to be paid to the said Jennie C. McKenzie, her attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of June, A. D. 1905.

Whereas, lately, at a term of the District Court for the Territory of Alaska, Third Division, in a suit pending in said court between said Jennie C. McKenzie, as plaintiff, and the said Hugh Madden and William Donohue, as defendants, wherein the said plaintiff sued for the possession of the second story of that certain building known as the Madden House, situate on the easterly one-half of lot four, in block one, east, between First and Second Avenues, in the town of Fairbanks, Territory of Alaska, Third Division, and for damages against defendants for the wrongful detention of said premises; a judgment was rendered against said defendants on the pleadings in said action. And the said Hugh Madden and William Donahue are about to obtain from

said court an order allowing an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the said decree and final judgment in the aforesaid suit, and a citation directed to said Jennie C. McKenzie, plaintiff above named, is about to be issued, citing and admonishing her, the said plaintiff, to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, State of California.

Now the condition of this obligation is such that if the said Hugh Madden and William Donahue shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, or either of them, if they fail to make their plea good, and shall fully pay the judgment in said cause rendered or to be rendered, and pay all just damages for delay, and costs and interest on appeal, and pay all damages for the use and detention of the property in controversy in said cause, as well as all costs of suit and appeal, and shall in all respects abide and perform the orders and judgments of the Appellate Court upon their said appeal, then the above obligation is to be void; otherwise to remain in full force and virtue.

HUGH MADDEN. [Seal]

WILLIAM DONOHUE. [Seal]

DANIEL A. McCARTY. [Seal]

DAVID FAIRBURN. [Seal]

United States of America,
Territory of Alaska. } ss.

Daniel A. McCarty and David Fairburn, the persons named in and who subscribed the above and foregoing undertaking as sureties thereto, being first severally and duly sworn, each for himself says:

That he is a resident within the territory of Alaska; that he is not a counselor, attorney at law, marshal, clerk of any court, or other officer of any court; that he is worth the sum specified in the foregoing undertaking, to wit, the sum of five thousand dollars ($5,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities.

DANIEL A. McCARTY.

DAVID FAIRBURN.

Subscribed and sworn to before me this 8th day of June, A. D. 1905.

[Seal] MORTON E. STEVENS,
Notary Public for Alaska.

Sufficiency of sureties on the within bond approved this 8th day of June, A. D. 1905.

JAMES WICKERSHAM,
Judge of said Court.

Filed in the United States District Court, District of Alaska, Third Division. June 8, 1905. E. J. Stier, Clerk.

[Title of Court and Cause.]

Citation.

The President of the United States, to Jennie C. McKenzie, Above-named Plaintiff, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing appeal, made and entered in the above-entitled cause, in which Jennie C. McKenzie is plaintiff and respondent, and the said Hugh Madden and William Donohue are defendants in said action and appellants in said appeal, to show cause, if any there be, why the decree and judgment rendered in said cause in the District Court for the Territory of Alaska, Third Division, against the defendants herein, should not be set aside, corrected and reversed, and why speedy justice should not be done to the said Hugh Madden and William Donohue in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 8th day of June, A. D. 1904, and of the Independence of the United States the one hundred and twenty-ninth.

JAMES WICKERSHAM,
Judge of the District Court for the Territory of Alaska, Third Division.

Attest: EDWARD J. STIER,
Clerk.

Due service of the within citation and receipt of a copy thereof admitted this —— day of June, A. D. 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

[Endorsed]: 315. In the District Court. McKenzie vs. Madden. Citation. Filed in the United States District Court, District of Alaska, 3d Division. Jun. 8, 1905. E. J. Stier, Clerk.

Acknowledgment of Service.

Service of the foregoing transcript of record by receipt of a copy thereof admitted this 8th day of July, 1905.

McGINN & SULLIVAN,
Attorneys for Plaintiff.

[Title of Court and Cause.]

Clerk's Certificate to Transcript.

I, Edward J. Stier, clerk of the District Court for the Territory of Alaska, Third Division, hereby certify the foregoing 47 typewritten pages, numbered from 1 to 47 inclusive, to be a full, true and correct copy of the record, bill of exceptions, assignment of errors and all proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court; and that the same is in full compliance with the order of said court allowing an appeal of said cause.

That pages 45 and 46 constitute the original citation and proof of service.

I further certify that the costs of the foregoing record on appeal are eleven and 95/100 dollars, and that said amount was paid by the defendants above named.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Fairbanks, Alaska, this 10th day of July, A. D. 1905.

[Seal] EDWARD J. STIER,
Clerk.

[Endorsed]: No. 1227. United States Circuit Court of Appeals for the Ninth Circuit. Hugh Madden and William Donohue, Appellants, vs. Jennie C. McKenzie, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Third Division.

Filed August 7, 1905.

F. D. MONCKTON,
Clerk.

No. 1227

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

J. C. CAMPBELL,
W. H. METSON,
J. C. DREW,
JOHN S. McGINN,
IRA D. ORTON,
Attorneys for Appellee.

The James H. Barry Co.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HUGH MADDEN AND WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Appellee.

BRIEF FOR APPELLEE.

I.

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. THE ACTION AND JUDGMENT BEING LEGAL, NOT EQUITABLE, CAN ONLY BE REVIEWED BY WRIT OF ERROR.

The complaint in this action sets forth all the facts necessary in an action in ejectment. While it is true a mandatory injunction is prayed for, none was granted either provisionally or finally. And it may well be

doubted, if the facts stated in the complaint are all admitted to be true, whether in any view of the case plaintiff was entitled to such relief. The judgment in the action is simply that plaintiff is the owner of the leasehold estate and for restitution of the possession of the premises. (Tr., fols. 34-36.) No equitable relief whatever is granted by the judgment, and therefore it should be brought into this Court by writ of error and not by appeal. It is well settled that if an action at law is brought into this Court by appeal instead of by writ of error, it must be dismissed for want of jurisdiction.

Bevins vs. *Ramsay,* 11 How., 185.
Mussina vs. *Cavazos,* 6 Wall., 358.

II.

THE PLAINTIFF WAS ENTITLED TO JUDGMENT ON THE PLEADINGS.

It is admitted by the defendants in their answer that the written lease mentioned and set forth in plaintiffs' complaint was duly executed, and it is also admitted that on the 23d day of May, 1905, six days before plaintiff was dispossessed, plaintiff paid to defendants the rent of $200 one month in advance. (Tr., pp. 10 and 17.) It is further expressly admitted by defendants that up to the 28th day of May, being the day just before plaintiff was dispossessed, "that all the terms" of the lease were carried out by plaintiff. (Tr., p. 19.) This is

sufficient answer to the claim in appellants' brief that any issue was made by the denial in the answer of the performance by plaintiff of the terms of the lease. The answer then proceeds (Tr., pp. 19 and 20) to state the only alleged breach by plaintiff of the terms of the lease. These allegations are as follows (Tr. pp. 19 and 20):

"5. That all of the terms of said agreement were carried out upon the part of plaintiff and defendants until about the 28th day of May, A. D. 1905, when plaintiff, in violation of her agreement and said lease, without any notice or warning to defendants, moved all of the furniture of said premises, excepting about four rooms thereof, out of said premises so leased and occupied by her, and for the purpose of cheating and defrauding defendants, and hindering their said business, plaintiff then and there implored, advised and commanded the occupants of said premises to leave said premises and go with her to the rooming-house, dance-hall and saloon of Joe Ward, situate on Fourth and Cushman streets, Fairbanks, Alaska.

"6. Defendants further allege, that, thereafter, and on the 29th day of May, 1905, defendant Donohue notified plaintiff that she had violated her contract with defendants, and the letter and spirit of said contract and lease, and that the said Donohue, being then the owner of said lease, declared the same forfeited.

"7. Defendants further allege that thereafter, and on, to wit, the 29th day of May, A. D. 1905, the defend-

ant Donohue took possession of all of said premises peaceably, and while the said plaintiff was out of the possession of the same, and has ever since held possession thereof, and is now in possession of the same, and of all of said premises and occupying the same as a hotel and lodging-house."

We most respectfully submit that it is plain from these allegations that plaintiff was entitled on the pleadings to judgment for the recovery of the possession of the premises in question. The original lease, being for the period of one year with the right to renew for another like period, was within the statute of frauds.

Alaska Code Civil Procedure, secs. 1044 and 1046.
Carter's Alaska Codes, pp. 354, 355.

The precise point was determined by the Supreme Court of Michigan in *Hand* vs. *Osgood,* 107 Mich., 65; *64 N. W.,* 867. Also by the New York Supreme Court in *Rosen* vs. *Rose,* 13 Misc. Rep., 565; *S. C.,* 34 N. Y. Supp., 467.

Any attempted oral modification of the written lease was void. This, for two reasons: first, because the statute of frauds requiring such a contract to be in writing, it could not be modified by parol, and, independent of the statute of frauds, the contract having actually been reduced to writing, it could not afterwards be modified by parol.

If the Court has jurisdiction, it is respectfuly submitted that the judgment should be affirmed.

J. C. CAMPBELL,
W. H. METSON,
F. C. DREW,
JOHN S. McGINN,
IRA D. ORTON,
Attorneys for Appellee.

No. 1227

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Appellee.

BRIEF OF APPELLANTS.

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

CLAYPOOL, STEVENS, KELLUM & COWLES,
Attorneys for Appellants.

EDWARD E. CUSHMAN,
Of Counsel.

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

No. 1227.

JENNIE C. McKENZIE,

Appellee

BRIEF OF APPELLANTS.

In this case the plaintiff below brought complaint against the defendants, appellants here, alleging, that she had leased certain premises—a hotel of nineteen rooms—from them for one year, commencing September 23, 1904. A copy of the lease is set out, showing an agreed rental of $200 per month, in advance, lessee to permit no waste, and to put in certain permanent fixtures and to furnish fuel for heating the building during the term. That she remained in possession until the 29th of May, 1905, when she was by the defendants forcibly ejected and ousted. That she had complied with all conditions of the lease and had on May 23, 1905, paid a month's rent in advance from that date. That on the 29th of May,

1905, the defendants forcibly ejected and ousted her from the premises, and have ever since, and now do, forcibly and unlawfully withhold the possession from the plaintiff and assert the lease to be terminated and forfeited. That the defendants were insolvent. That unless the defendants were enjoined from withholding such possession and the same restored, the plaintiff would suffer irreparable loss. That plaintiff had no plain, adequate or speedy remedy at law. That she had been damaged in the sum of $500.

She prays a judgment decreeing her entitled to immediate possession of the property and the immediate return thereof. That defendants be restrained from disturbing her possession.

Upon this complaint a show cause order was issued, reciting that it appearing from the complaint to be a proper case for granting an injunction "restoring to plaintiff the possession of the premises," that if they, the defendants, failed to show cause, the Court would make an order restoring the plaintiff to the possession of the property described.

A motion to dismiss was then interposed on the ground that the Court was without jurisdiction; that it appeared from the complaint that plaintiff had a plain, speedy and adequate remedy at law, and that the complaint did not state sufficient facts to entitle plaintiff to the relief prayed.

This order was overruled; a demurrer was interposed including the same grounds of objection. This was overruled. An answer was then made admitting the execution of the lease, denying the forcible and unlawful ejec-

tion and ouster, admitting the month's rent paid May 23, 1905, but denying full compliance with the lease by plaintiff; admitting re-entry into possession without plaintiff's consent, and admitting that defendants assert the lease forfeit.

Insolvency of defendants is denied; also the allegation of irreparable loss and injury. Denies that there is no plain, speedy and adequate remedy at law, and denies plaintiff's damage in any amount.

The answer further sets up an affirmative defense admitting the lease. That the premises were entered and run by the plaintiff as a lodging-house, being the rooms on the second story of defendants' building, in the lower story of which they conducted a retail liquor business. That after entry upon the premises by the plaintiff the lease was modified by an oral agreement, by the terms of which plaintiff was to personally occupy and manage said rooming-house, and endeavor to keep it occupied by persons who would patronize defendants' bar; she to receive a commission on liquors sold. That all agreements were kept until May 28, 1905, when plaintiff broke her agreement and moved out and abandoned said premises, and enticed away the occupants to a rival place of business. That defendants notified plaintiff she had violated her contract and peaceably retook possession while she was out of possession, and still retained it. The answer recites the interests of defendants in the property, and charges a conspiracy between plaintiff and a competitor in business of defendants to destroy the latter's business by keeping said premises unoccupied.

The answer alleges the solvency of the defendant Donahue; alleges that he is worth $10,000 above debts and exemptions; alleges that plaintiff has a plain, speedy and adequate remedy at law; that defendants have been damaged in the sum of $1,000.

Upon the order to show cause, affidavits were filed upon behalf of defendants supporting their answer, giving details tending to support the conspiracy charge, and alleging that if allowed time fuller and more satisfactory proofs would be produced.

That plaintiff abandoned said premises and had acquiesced in defendants' re-entry by removing the remainder of her furniture thereafter. That defendants had refurnished said premises thereafter at great expense.

There were no counter-affidavits nor reply to the answer.

Plaintiff moved for judgment on the pleadings and a final judgment was granted, which recited that defendants had, "unlawfully and against the consent of plaintiff, taken possession of said premises," and had since so held possession. That the plaintiff was the owner of a legal estate for years in the premises. That the plaintiff was entitled to possession and costs.

Appeal has been taken from said judgment by the defendants and the following errors assigned:

"I.

That the Court erred in denying defendants' motion to dismiss the above-entitled cause.

II.

That the Court erred in overruling defendants' the re-
rer to plaintiff's complaint in said cause. for the

III.

That the Court erred in granting plaintiff's mot
judgment on the pleadings in said action.

IV.

That the Court erred in rendering and enterin t to be
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AS TO THE ADEQUACY OF THE REMEDY AT
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Alaska, p. 210), made full provision for the recov
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Chapter 99 of said Laws (Idem, page 350 et seq.)
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These certainly provided a plain, speedy and adinding
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As the complaint fully shows, and the order to, then
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Appeal has been taken from said judgment by the defendants and the following errors assigned:

"I.

That the Court erred in denying defendants' motion to dismiss the above-entitled cause.

II.

That the Court erred in overruling defendants' demurrer to plaintiff's complaint in said cause.

III.

That the Court erred in granting plaintiff's motion for judgment on the pleadings in said action.

IV.

That the Court erred in rendering and entering judgment against defendants in favor of plaintiff in said action."

AS TO THE ADEQUACY OF THE REMEDY AT LAW AND SUFFICIENCY OF THE COMPLAINT:

Chapter 32 of the Alaska Civil Code (Carter's Codes of Alaska, p. 210), made full provision for the recovery by ejectment of the possession of real property.

Chapter 99 of said Laws (Idem, page 350 et seq.), made provision for the summary recovery of the possession of real property in a forcible entry and detainer act.

These certainly provided a plain, speedy and adequate remedy at law with the right of jury trial.

As the complaint fully shows, and the order to show cause and the judgment, it was not an attempt to protect some one in possession from interference, but the plain proposition of ejecting the possessor and recovery of possession by the one out of it. If that was a wrong it was past. There would be more reason to supplant the action of replevin by an equity suit than this, for personal property can be concealed and transferred.

If such a proceeding as this lies, there would have been no necessity for a forcible entry and detainer act.

16 Ency. of Law, 2d ed., 352 et seq., 362 and 364.

The plaintiff did not allege that she desired to enter into the possession nor occupy the premises. She asked extraordinary relief, saying the defendants were insolvent, yet she offered no bond to them, nor was she required to give them one.

The Court further erred in rendering judgment upon plaintiff's motion against the defendants upon the pleadings as fraud. The only motion for judgment upon the pleadings authorized by the Alaska Code of Procedure is the defendants' motion.

Sec. 64, Part IV, Carter's Codes, p. 158.

If we are to consider the plaintiff's motion as a demurrer or in the nature of a motion upon the bill and answer, turning to the answer it is seen that the allegations of paragraphs 3, 5 and 6 of the complaint were denied; that is, it was denied that plaintiff had kept the covenants of the lease; that the defendants were insolvent, and that there was not a plain, speedy and adequate remedy at law. The denial of paragraph 3 tendered an issue on the merits, for if she had broken the covenants of the lease the defendants had the right to re-enter.

Turning to the affirmative defense disclosed by the answer, it would appear that an abandonment of such property as described in the answer would be the commission of waste upon the estate and justify the forfeiture de-

clared by the defendants; at any rate, it was such an abandonment as disclosed by the answer as justified the re-entry of the landlord for the purpose of caring for the premises.

18 Ency. of Law, 2d ed., 304.

The answer sets up that a new oral agreement for a consideration was made after the written lease and the entry under it, whereby the plaintiff, besides the cash rent to be paid, disposed of her goodwill and efforts to promote the liquor business of the defendants, and that the plaintiff conspired with a competitor of defendants, and fraudu-

leaf on Evidence, 16th Ed. Section
oral agreement pleaded only effect- was after
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l by the Lease.
ute of Frauds, Chapter 6 "Year"
Sections 197 et seq. 200 and 204 . e year.

The answer shows a perfor[illegible]nce of the new contract, till the forfeiture claimed. It was either a legal binding agreement or it was void.

Appellants claim it was the former. If it was, then certainly they have plead a gross violation and breach of its terms authorizing the declaration of the forfeiture of the lease.

If it was void, the plaintiff was a tenant at will from the beginning, and defendants had the right to re-enter at any time.

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tions Note 91, Section 390 B. C. Oregon Codes,
ters 38 and 39 Alaska Practice Act.
ka Practice Act, Section 168 and 208
ps vs. Kelly 17 Oregon, 213. And case cited
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vs. R. R. 105 U. S. 212.
vs. Wilson, 118 U. S. 89.
ed. 538, 60 Fed. 314
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The answer sets up that a new oral agreement for a consideration was made after the written lease and the entry under it, whereby the plaintiff, besides the cash rent to be paid, disposed of her goodwill and efforts to promote the liquor business of the defendants, and that the plaintiff conspired with a competitor of defendants, and fraudu-

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The answer shows a performance of the new contract, till the forfeiture claimed. It was either a legal binding agreement or it was void.

Appellants claim it was the former. If it was, then certainly they have plead a gross violation and breach of its terms authorizing the declaration of the forfeiture of the lease.

If it was void, the plaintiff was a tenant at will from the beginning, and defendants had the right to re-enter at any time.

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Turning to the affirmative defense disclosed by the answer, it would appear that an abandonment of such property as described in the answer would be the commission of waste upon the estate and justify the forfeiture de-

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18 Ency. of Law, 2d ed., 304.

The answer sets up that a new oral agreement for a consideration was made after the written lease and the entry under it, whereby the plaintiff, besides the cash rent to be paid, disposed of her goodwill and efforts to promote the liquor business of the defendants, and that the plaintiff conspired with a competitor of defendants, and fraudulently violated this part of the agreement.

The answer discloses a new agreement. It was after the first written one, and was therefore not an attempt to vary its terms.

It was not to lease for a longer period than one year.

Carter's Codes, sec. 1044, p. 354.

The answer shows a performance of the new contract, till the forfeiture claimed. It was either a legal binding agreement or it was void.

Appellants claim it was the former. If it was, then certainly they have plead a gross violation and breach of its terms authorizing the declaration of the forfeiture of the lease.

If it was void, the plaintiff was a tenant at will from the beginning, and defendants had the right to re-enter at any time.

McAdam on Landlord and Tenant, chapter 12.
18 Am. & Eng. Ency., 2d ed., 184 and cit., note 7.

If an illegal arrangement or agreement between the parties was disclosed by the answer, the Court would have refused relief to either party. The answer not being denied, the conclusion follows that the lower court must have considered the agreement plead in the affirmative portion of the answer as legal and binding, but that the plaintiff's acts did not justify a re-entry by the landlord.

In this the lower court was clearly in error, for it is difficult to show a more perfect type of fraud practiced than that disclosed by the answer as worked by the plaintiff. The only reasonable explanation of her abandonment of the premises immediately after paying a large monthly rental in advance is the one as cited and alleged as a fact by the answer and not denied.

Either this fraud or the abandonment itself justified a re-entry and rescission of the contract by the defendants, and the rent having been paid as a part of the scheme and a portion of the term for which payment was made having expired before the fraudulent abandonment and other acts during which time the occupancy of the premises for which rent was paid having continued, there was no obligation upon the part of the defendants to tender any part of such rent in order to rescind.

It will be noted that the Court found none of the facts on which it was sought to base a claim to equitable jurisdiction. Defendants had denied insolvency. The Court

could not proceed to judgment on the face of it without evidence, and there was none.

The only basis of the equity jurisdiction sought and attempted to be exercised was the preventive relief—the injunctive relief prayed. Yet the Court did not find plaintiff entitled to any; nor was any awarded.

The Court simply made a decree as to the title to the property.

For the foregoing reasons it is respectfully submitted that the Court erred in the respect of which complaint is made, and that an original decree of dismissal of the plaintiff's complaint should be granted by this Court.

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